Petition

81-1871

No.

Supreme Court, U.S.
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ALEXANDER L. STEVAS
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MECO, INCORPORATED - - - - **Petitioner**

versus

HONORABLE CHARLES S. SINNETTE,
Judge, Boyd Circuit Court, Division II and
HARRY KAUFMAN and
KEITH HAMNER, - - - - - **Respondents**

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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April 7, 1982

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTIONS PRESENTED

1. Have the courts of Kentucky violated the Commerce Clause (Article I, §8) and the Supremacy Clause (Article VI, Clause 2) of the United States Constitution by refusing to apply the provisions of the Federal Arbitration Act (9 U.S.C., §1-4), by enjoining submission of matters in dispute to arbitration, and by refusing to stay state court proceedings pending arbitration where it is undisputed that a timely initial demand for arbitration was made by Petitioner pursuant to an "all issues" arbitration clause contained in a written contract involving interstate commerce?

2. Have the appellate courts of Kentucky violated the Due Process Clause (Fourteenth Amendment, §I) of the United States Constitution by refusing to grant Petitioner a timely and meaningful hearing in an original action seeking a stay of state court proceedings pending arbitration and dissolution of a circuit court order enjoining Petitioner from exercising its federally assured right to arbitration?

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IN THE

SUPREME COURT OF THE UNITED STATES

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No._____

MECO, INCORPORATED, - - - - - *Petitioner*

v.

HONORABLE CHARLES S. SINNETTE, Judge,
Boyd Circuit Court, Division II and
HARRY KAUFMAN and
KEITH HAMNER, - - - - - - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The Petitioner, MECO, Incorporated,[1] ("MECO"), prays a Writ of Certiorari issue to review the Order of the Supreme Court of Kentucky entered on October 13, 1981, which said Order became final on January 12, 1982, upon denial of a Motion for Reconsideration by that Court.

OPINIONS BELOW

Several opinions of the courts of Kentucky are involved in this Petition for Writ of Certiorari. None of these opinions are reported; all are contained in the Appendix to this Petition, designated as follows:

1. A Januuary 12, 1979, Temporary Restraining Order of the Boyd Circuit Court prohibiting arbitration. App. B, p. 25.

[1]MECO, Incorporated, is a wholly owned subsidiary of Metropolitan Erecting Co., Inc. Both are Kentucky corporations.

2. An October 13, 1980, Order of the Boyd Circuit Court denying Petitioner's motion to vacate the Temporary Restraining Order and to compel submission to arbitration. App. C, p. 26.

3. A December 29, 1980, Order of the Boyd Circuit Court enjoining Petitioner from attempting to arbitrate. App. D, p. 27.

4. A February 9, 1981, Order of the Kentucky Court of Appeals dissolving the Boyd Circuit Court Temporary Restraining Order and declining to rule on a Writ of Prohibition to the Boyd Circuit Court. App. E, p. 28.

5. A June 16, 1981, Finding of Fact, Conclusion of Law, and Order of the Boyd Circuit Court enjoining Petitioner from proceeding with arbitration. App. F, p. 30.

6. A July 21, 1981, Order of the Kentucky Court of Appeals denying Petitioner's motion for a stay of state court proceedings and denying Petitioner's Motion for writ to the Boyd Circuit Court prohibiting it from enjoining Petitioner from proceeding with arbitration. App. G, p. 32.

7. An October 13, 1981, Order of the Supreme Court of Kentucky affirming the July 21, 1981, Order of the Kentucky Court of Appeals. App. A, p. 23.

8. A January 12, 1982, Order of the Supreme Court of Kentucky denying Peittioner's motion for reconsideration. App. H, p. 33.

9. A February 12, 1982, Order of the Supreme Court of Kentucky granting Petitioner's motion for stay of execution and enforcement of its Opinion and Order of October 13, 1981, pending this Petition for a Writ of Certiorari. App. I, p. 34.

JURISDICTION

The Kentucky Supreme Court entered an Order in this matter on October 13, 1981, which became final on January 12, 1982, upon denial of Petitioner's motion for reconsideration. This Petition is filed within ninety (90) days of January 12, 1982. Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution

The Commerce Clause of the United States Constitution (Article I, Section 8):

> "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes . . ."

The Supremacy Clause of the United States Constitution (Article VI, Clause 2):

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary not withstanding."

Fourteenth Amendment, Section I:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without Due Process of Law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Code

Federal Arbitration Act (9 United States Code, Sections 1-4): Set out at Appendix N, pp. 50-52.

STATEMENT OF THE CASE

On October 3, 1977, the Petitioner, MECO, Incorporated ("MECO") entered into a standard form American Institute of Architects' contract with Respondents Harry Kaufman and Keith Hamner ("KAUFMAN AND HAMNER") for construction of a coal crushing and loading facility extending into the Big Sandy River from a point on its shore in Boyd County, Kentucky. Article 7 of the General Conditions of this contract contains a mandatory arbitration clause whereby the parties agreed to submit "all issues" in dispute to arbitration. App. J, p. 35.

The purpose of the loading facility was to place coal directly into barges on a navigable waterway for shipment to points primarily outside of the Commonwealth of Kentucky.

Because the facility extended into a navigable waterway, proper authorization for and approval of

the project was requested and received from the United States Army Corps of Engineers. Seventy-one (71%) percent of all subcontractors and vendors involved in the construction project resided outside of the Commonwealth of Kentucky; all major equipment incorporated into the project was shipped from vendors located outside the Commonwealth of Kentucky; and twenty-one (21%) percent of the employees working on the project resided outside the Commonwealth of Kentucky, many of whom traveled across state lines each day to work on the project. App. L, p. 38. This interstate nexus has never been seriously disputed by KAUFMAN AND HAMNER.

By the fall of 1978 a dispute had arisen between MECO and KAUFMAN AND HAMNER concerning payment of money due and owing on the job and various site conditions. As a result of this dispute, in accordance with Article 7 of the General Conditions of the Contract, MECO filed a demand for arbitration with the American Arbitration Association (AAA) on October 10, 1978. This demand was properly served upon KAUFMAN AND HAMNER on October 12, 1978.

KAUFMAN AND HAMNER refused to participate in arbitration. On the 12th day of January, 1979, they filed a defensive action in the Boyd Circuit Court requesting, inter alia, that a temporary restraining order be issued against MECO enjoining it from proceeding with arbitration.

Such a restraining order was initially issued by the Boyd Circuit Court on January 12, 1979, App. B, p. 25.

On the 2nd day of February, 1979, MECO petitioned for removal of the Boyd Circuit Court action to the United States District Court for the Eastern District of Kentucky and filed an appropriate answer to the suit in the United States District Court specifically asserting its right to mandatory arbitration. Originally its was thought that diversity of citizenship existed, however it was ultimately determined that there was no diversity and the action was remanded to state court on the 24th day of May, 1979. During this same time frame, the attorney for MECO, James E. Cleveland, III, informed MECO that, due to a conflict of interest involving his representation of a bank holding a security interest in KAUFMAN AND HAMNER'S property, he could not represent it in proceedings in state court.

During the summer of 1979, amicable negotiations were underway between MECO and KAUFMAN AND HAMNER in a good faith attempt to settle this dispute between them.

During this time frame, MECO was without counsel but was under the impression that counsel was not necessary because it had an understanding with KAUFMAN AND HAMNER that all proceedings concerning the various claims arising out of the contract would be stayed pending these settlement negotiations. Also during this same time frame MECO agreed with KAUFMAN AND HAMNER by letter to the AAA to withdraw the arbitration demand it had filed from the active

trial docket of the AAA conditioned upon settlement of all issues. App. K, p. 37.[2]

Settlement negotiations broke down in the fall of 1979 and MECO then retained attorney J. P. Vincent of Ashland, Kentucky to represent it. Immediately thereafter, in order to clear an obvious default situation which existed in the Boyd Circuit Court action, Mr. Vincent tendered a motion to file a late Answer and Counterclaim in the state court action. No discovery or other activity had transpired in the state court action since remand from federal court. App. M, p. 46.

On the 25th day of March, 1980, the Boyd Circuit Court entered an Order allowing MECO to file its answer but denying its Motion to file a counterclaim.

MECO then filed a Motion and Memorandum of Points and Authorities, supported by an Affidavit, to dissolve the Temporary Restraining Order of January 12, 1979, and to proceed with its arbitration demand which had been pending with the AAA since October 10, 1978.[3]

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[2]KAUFMAN AND HAMNER have not disputed that active attempts to settle the case were proceeding during this time frame and have presented no evidence other than the June 26, 1979 letter. App. K, p. 37.

[3]Kentucky Civil Procedure, unlike Federal Civil Procedure, does not provide for automatic dissolution of Temporary Restraining Orders. Consequently, in Kentucky a Temporary Restraining Order remains in affect until the matter is brought on for a hearing on a Motion to Dissolve the Restraining Order or Motion to issue a Temporary Injunction or until Final Judgment in the case. KRCP 65.03 (5).

In the interim between the time MECO's demand was originally filed with the AAA and KAUFMAN AND HAMNER went to State Court to procure the Restraining Order blocking MECO from arbitration and the time when MECO petitioned the Court to dissolve its Restraining Order and allow the parties to proceed with arbitration, no discovery, status or pretrial conferences, nor any other substantive activity was undertaken by either party in the Boyd Circuit Court action. App. M, p. 46.

In response to MECO's Motion, KAUFMAN AND HAMNER filed a Memorandum of Counsel contending that MECO had abandoned arbitration, and accompanied by a copy of the previously mentioned letter to the AAA which had been written during the summer of 1979, withdrawing the matter from the active trial docket of the AAA pending settlement.

Any implication that this letter constituted abandonment of arbitration was controverted by a Supplementary Affidavit of MECO's President, in which he introduced several exhibits including three contemporaneous letters from the AAA substantiating that the arbitration had been withdrawn from the active trial docket of the AAA by mutual agreement of the parties conditioned upon settlement; and that at no time did he abandon or renounce his right to arbitration. App. L, p. 38.[4]

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[4]This Affidavit refers to a number of exhibits, all of which appear in the record. In the interest of brevity and economy, only the most pertinent exhibits are included with the Affidavit in Appendix L.

No additional evidence was submitted by KAUFMAN AND HAMNER on this or any other point.

In late September of 1980, MECO retained its current counsel.

After several continuances granted upon request of Respondents' Counsel, a hearing was held on October 3, 1980, on MECO's Motion to dissolve the January 12, 1979, Restraining Order and to submit the matter to arbitration. Two principal orders ultimately issued as a result of that hearing: first, an Order of October 13, 1980, denying MECO's motion to vacate the January 12, 1979, Restraining Order and to compel submission to arbitration (App. C, p. 26); and second, a subsequent Order of December 29, 1980, enjoining MECO from attempting to arbitrate the issues in this case. App. D, p. 27.

Subsequent to these orders, MECO moved the Kentucky Court of Appeals to set aside the Temporary Injunction pursuant to KRCP 67.07 and to issue an Extraordinary Writ pursuant to KRCP 76.36 staying the circuit court proceedings pending submission of the issues to arbitration.

Upon review of the matter, the Court of Appeals issued an Order on February 9, 1981, setting aside the Boyd Circuit Court Order of December 29, 1980, but declined to rule upon the Petition for Writ of Prohibition because the circuit court had issued no findings incident to its December 29, 1980, Order from which the Court of Appeals could determine whether the injunction was issued "because the contract itself did not

require binding arbitration or because the Federal Arbitration Act was inapplicable." App. E, p. 28.

Thereafter, on the 13th day of February, 1981, MECO contacted the AAA and requested that the AAA proceed with administration of the arbitration demand that had been pending since October, 1978; immediately thereafter the AAA commenced the process of selection of arbiters.

KAUFMAN AND HAMNER then filed another Motion for a Temporary Injunction before the Boyd Circuit Court. MECO responded to this Motion, and the matter came on for hearing before the Boyd Circuit Court for a second time on April 15, 1981.

The Boyd Circuit Court issued a Finding of Fact, a Conclusion of Law, and its third Order enjoining MECO from arbitrating on June 16, 1981. App. F, p. 30.

On July 3, 1981, MECO filed a second action in the Kentucky Court of Appeals under KRCP 65.07 and KRCP 76.36 contending that the Boyd Circuit Court had acted outside of its jurisdiction and disregarded MECO's federally assured right to arbitration of disputes involved in an interstate contract. This action came before a different panel of the Kentucky Court of Appeals than that which had issued the previous Court of Appeals Order of February 9, 1981.[5]

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[5]Because the action under Rule 76.36 requested an Extraordinary Writ from the Kentucky Court of Appeals, it is considered by the Kentucky Rules of Civil Procedure to be an original action.

MECO was not afforded a hearing on the federal issues it raised in this original action.

On July 21, 1981, the Court of Appeals issued an Order denying the relief sought by MECO. App. G, p. 32. This Order does not address the presence or absence of error in the Boyd Circuit Court Order, does not address the prior Court of Appeals Order of February 9, 1981, does not address the jurisdiction of the Boyd Circuit Court, and does not address MECO's federal right to arbitration under the Supremacy Clause of the United States Constitution and Title 9, United States Code; but, rather, appears to be premised solely upon technical availability to MECO of a state court appeal of the federal issues involved subsequent to a circuit court trial of KAUFMAN AND HAMNER'S civil complaint.

On the 21st day of August, 1981, MECO filed an Appeal of the July 21, 1981, Court of Appeals decision to the Supreme Court of Kentucky in accordance with the provisions of KRCP 76.36 which afford Petitioner a mandatory appeal to the Kentucky Supreme Court in this instance.

On the 13th day of October, 1981, the Supreme Court of Kentucky issued an Order denying the relief sought by MECO, again premised solely on MECO's technical right to appeal the federal issues involved subsequent to a trial in Boyd Circuit Court. App. A, p. 23.

MECO filed a timely Motion for Reconsideration to the Supreme Court of Kentucky; that Motion was

denied on the 12th day of January, 1982. App. H, p. 33.

MECO then filed a timely Motion pursuant to KRCP 76.44 for a stay of Kentucky state court proceedings pending this Petition for Writ of Certiorari to the United States Supreme Court. That Motion was affirmed on the 12th day of February, 1982, granting MECO a stay of state court proceedings to, and including, the 13th day of May, 1982. App. I, p. 34.

ASSERTION OF FEDERAL QUESTIONS

The federal questions sought to be reviewed by the United States Supreme Court and the federal rights asserted by Petitioner were raised by way of Petitioner's original demand for arbitration, its petition for removal and its responsive pleading filed incident to its attempted removal of the Boyd Circuit Court action to Federal Court, its original motion and brief to the Boyd Circuit Court for a stay of state court action and dissolution of the Restraining Order prohibiting arbitration, its supplemental memorandum to the Boyd Circuit Court, in both briefs of Petitioner to the Kentucky Court of Appeals, in Petitioner's appellate brief to the Supreme Court of Kentucky, and in Petitioner's motion for reconsideration to the Supreme Court of Kentucky, all contained in the record herein. These questions and issues were also raised by Petitioner at oral argument before the Boyd Circuit Court on the 3rd day of October, 1980, and the 15th day of April, 1981, which said Oral Arguments were not transcribed and do not appear in the record.

In each instance when these federal issues were raised, the courts of Kentucky denied Petitioner its relief sought.

REASONS FOR GRANTING THE WRIT

I.

The Kentucky Courts, By Disregarding the Provisions of the Federal Arbitration Act and the Decisions of This Court Mandating Access to a Federal Forum, Are In Conflict With This Court's Interpretation of the Commerce Clause and the Supremacy Clause of the United States Constitution.

In situations where parties to a written contract involving interstate commerce have evidenced an agreement to submit issues in dispute to arbitration, this Court's commitment to resolution of such disputes by way of mandatory arbitration is unquestioned. *Scherk* v. *Alberto-Culver,* 417 U. S. 506 (1974), *Operating Engineers* v. *Flair Builders,* 406 U. S. 487 (1972), *Prima Paint Corp.* v. *Flood & Conklin,* 388 U. S. 395 (1967), *Wiley & Sons* v. *Livingston,* 376 U. S. 543 (1964).

More recently, in a factual situation extremely analogous to the factual situation presented by this motion, where a state court in New Mexico attempted to enjoin a party's federally assured access to arbitration, this Court held:

> "[T]hat the Santa Fe [New Mexico state] court is without power under the United States Constitution to interfere with efforts by GAC to obtain arbitration in federal forums on the ground

> that GAC is not entitled to arbitration or for any other reason whatsoever. GAC, as we previously held, has an absolute right to present its claims to federal forums." *General Atomic Company* v. *Edwin L. Felter,* 436 U. S. 493, 497 (1978) (parenthetical matter added).

In the case at bar, a situation is presented where there is no dispute as to the existence of a written agreement to arbitrate, no dispute as to the nexus of this agreement to interstate commerce and no dispute as to the timeliness of Petitioner's initial demand for arbitration prior to intervention and prohibition of the arbitration process by the Boyd Circuit Court.

In this case, the deprivation of Petitioner's right of access to a federal forum has occurred at two levels, the trial court level and the appellate court level.

By intervening in a pending arbitration action between the parties where applicability of the provisions of the Federal Arbitration Act under *Prima Paint* are clear, the Boyd Circuit Court disregarded the provisions of *Prima Paint* and the Federal Arbitration Act and, in so doing, acted in contravention of both the Commerce Clause and the Supremacy Clause of the United States Constitution.

By refusing to hear the merits of Petitioner's original action in the Kentucky Court of Appeals, by refusing to dissolve the order of the Boyd Circuit Court enjoining Petitioner from proceeding with arbitration, and by refusing to stay state court proceedings pending exercise of Petitioner's federally assured right to arbitration, the appellate courts of Kentucky have also

disregarded the clear mandate of this Court set forth in *Prima Paint* and *General Atomic Company* and, consequently, have acted in contravention of the Federal Arbitration Act, the Commerce Clause and the Supremacy Clause of the United States Constitution.

As the record of this case currently stands, if this Motion for Writ of Certiorari is denied and Petitioner is not granted the relief sought, it will suffer immediate and irreparable damage, *Buffler* v. *Electronic Computer Programming Inst., Inc.*, 466 F. 2d 694 (6th Cir. 1972), in that it will forever lose its federal right of timely access to arbitration without the necessity of first becoming involved in a full trial and its third appeal in state court.

Accordingly, as the actions of the courts of Kentucky are in a direct conflict with constitutional provisions and the prior decisions of this Court, this Motion for Writ of Certiorari should be granted.

II.

The Kentucky Appellate Courts Have Denied Petitioner Due Process of Law in Violation of the Fourteenth Amendment to the United States Constitution by Refusing to Afford It a Timely and Meaningful Hearing on the Issue of Its Access to Federal Arbitration as an Exclusive Remedy.

Subsequent to issuance of the Boyd Circuit Court Order of June 16, 1981, Petitioner filed an *original action* in the Kentucky Court of Appeals asserting its federally assured right to arbitration pursuant to the provisions of the Federal Arbitration Act, and the

Commerce and Supremacy Clauses of the United States Constitution. Neither the Kentucky Court of Appeals nor the Supreme Court of Kentucky granted Petitioner a hearing on the federal issues raised by it; but, rather, passed consideration of the federal issues involved until a possible future appeal on the merits of the entire case.

Under the facts of this case, if this Motion for Writ of Certiorari is not granted and the relief sought by Petitioner is not afforded, Petitioner will be required to fully litigate this action in a state court trial in which it was not even allowed to file a compulsory counter-claim before it will next have an opportunity to have its federal right to arbitration considered by a state court in Kentucky. Very conceivably, Petitioner could be forced to try this case twice; first, in the Boyd Circuit Court on the merits of KAUFMAN AND HAMNER's claim, and then, again, before the AAA on the merits of the entire case, assuming MECO's federal right to arbitration is ultimately recognized by a Kentucky appellate court on an appeal subsequent to a full state court trial.

This is *not* what the parties bargained for in their contract of October 3, 1977, and it is *not* what the Congress of the United States intended when it enacted the Fedreal Arbitration Act to provide those conducting business in interstate commerce with the ability to resolve disputes in a timely fashion by arbitration without the intervention of protracted trial court proceedings.

Refusal of the Kentucky appellate courts to grant Petitioner a timely and meaningful hearing for consideration of its federal rights constitutes a direct violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as interpreted by this Court in *William C. Barry* v. *John Barchi*, 443 U. S. 55 (1979).

Accordingly, as the actions of the Court of Appeals and Supreme Court of Kentucky are in direct conflict with Constitutonal provisions and the prior decisions of this Court, this Motion for Writ of Certiorari should be granted.

III.

Review Is Necessary to Clarify the Position of This Court and To Resolve an Apparent Conflict Between the Opinions of Two Federal Circuit Courts on the Issue of Applicability of the Stay Provisions of Section 3 of the Federal Arbitration Act to State Court Proceedings.

Had diversity of citizenship existed between the parties and had this action thereby been removable to Federal Court in early 1979, when such removal was originally sought by Petitioner, the United States District Court for the Eastern District of Kentucky would have had no alternative but to stay its proceedings and submit the matter in controversy to binding arbitration.

However, here we have a situation where there was no diversity of citizenship and the state courts of Kentucky refused to enforce the provisions of federal law and the prior mandates of this Court.

In *General Atomic Company, supra,* this Court held that a state court could not deny a Petitioner proper access to the federal forum presented by arbitration.

However, in the aftermath of *General Atomic Company* an important point remains to be decided by this Court. This point resolves itself thusly: Where the fundamental jurisdictional provisions of the Federal Arbitration Act have been met so as to prohibit a state court from denying a Petitioner proper access to a federal forum, does not the Federal Arbitration Act also require that state court proceedings be stayed during the pendency of arbitration?

It appears to be clear that in similar instances a Federal District Court would have no alternative but to stay its proceedings. *Prima Paint, supra, C. Itoh & Co. (America) Inc.* v. *Jordan International Company,* 552 F. 2d 1228 (7th Cir. 1977), *Miller* v. *Aaacon Auto Transport, Inc.,* 545 F. 2d 1019 (5th Cir. 1977), *Hanes Corp.* v. *Millard,* 531 F. 2d 585 (D. C. Cir. 1976).

However, this Court's decision in *General Atomic Company* does not address this issue directly and there appears to be a *disparity of opinion on this issue between two federal circuits.*

The decision of the United States Court of Appeals for the Fourth Circuit in *Mercury Construction Corporation* v. *Moses H. Cone Memorial Hospital,* 656 F. 2d 933 (4th Cir. 1981), relying, in part, on *Prima Paint,* indicates that where the jurisdictional requirements of the Federal Arbitration Act have been met, both state courts and federal courts *must* apply the mandate

of Section 3 of the Federal Arbitration Act and stay proceedings pending arbitration.

On the other hand, the United States Court of Appeals for the Seventh Circuit, in *Commonwealth Edison Co.* v. *Gulf Oil Corp.*, 541 F. 2d 1263 (7th Cir. 1976), basing its decision upon an interpretation of the federal anti-injunction statute, 28 United States Code, Section 2283, rather than the Federal Arbitration Act, indicates that a stay of state court proceedings pending arbitration under the Feedral Arbitration Act is *not* mandatory.

The *General Atomic Company* opinion is not dispositive of the issue in that, while it grants GAC an absolute right to proceed with arbitration, it also states, in part, that:

> "[O]ur prior decision [does not] prevent the Santa Fe court . . . from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums." *Id.* at 497 (Parenthetical matter added).

This sentence of *General Atomic Company*, if it is to be interpreted as an affirmative grant of authority to state courts allowing them to conduct trials concurrent with federally assured arbitration would vest state courts with a species of jurisdiction evidently intended by Congress to be proscribed from *all* courts, *state and federal alike*. *See* 9 U.S.C. §3, *Prima Paint, supra.*

In addition to giving rise to a type of forum shopping heretofore rejected by this Court, *Scherk* v. *Alberto-Culver Company, supra,* such an implicit grant

of authority would allow state courts to usurp federal sovereignty in an area which was exclusively reserved to the Congress by the Commerce Clause of the United States Constitution. The rejection of such notions of usurpation of federalism has its foundation in no lesser precedent than *McCulloch* v. *The State of Maryland,* 17 U. S. (4 Wheat.) 316 (1819), in which Mr. Chief Justice Marshall taught that:

> "The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution-powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them." *Id.* at 429.

Accordingly, it is appropriate for this Court to grant Petitioner's Motion for Writ of Certiorari so that this crucial question of federal law and an apparent conflict of opinion between two federal circuit courts can be finally resolved.

CONCLUSION

For any one, or all of the reasons set forth above, minimally, a Writ of Certiorari should be granted by this Court.

Respectfully submitted,

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Appendix

APPENDIX A

FINAL

NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

81-SC-599-MR

MECO, INCORPORATED - - - - - *Appellant*

v.

HONORABLE CHARLES S. SINNETTE, Judge,
Boyd Circuit Court, Division Two, and
HARRY KAUFMAN and KEITH HAMNER - - *Appellees*

On Appeal from the Court of Appeals
81-CA-1251-I

MEMORANDUM OPINION AND ORDER

This court finds no reason to disturb the ruling of the Court of Appeals to the effect that Meco, Incorporated, has an adequate remedy by appeal. Its order denying relief is therefore affirmed.

All concur.

ENTERED October 13, 1981.

(s) John S. Palmore
Chief Justice

Attorneys for Appellant:

DAVID B. RATTERMAN
GOLDBERG & SIMPSON, P.S.C.
2800 First National Tower
Louisville, Kentucky 40202

CARL D. EDWARDS, JR.
VAN ANTWERP, HUGHES, MONGE AND JONES
1416 Winchester Avenue
Ashland, Kentucky 41101

Attorney for Appellees Kaufman and Hamner:

HENRY R. WILHOIT, JR.
P. O. Box 35
Grayson, Kentucky 41143

APPENDIX B

BOYD CIRCUIT COURT

Civil Action No. 79-CI-014

HARRY KAUFMAN and KEITH HAMNER
of Ashland, Kentucky, - - - - *Plaintiffs*

v.

MECO, INCORPORATED,
2340 Rockford Lane
Louisville, Kentucky 40216
SERVE: Joe Dooley, President - - - *Defendants*

RESTRAINING ORDER — Filed January 12, 1979

For good cause set forth in the Complaint, it is now ordered that the Defendant, Meco, Incorporated, is hereby restrained from proceeding further with arbitration in this action before the American Arbitration Association, 2308 Carew Tower, Cincinnati, Ohio until further orders of this Court.

This 12th day of January, 1979.

(s) Charles S. Sinnette
Judge, Boyd Circuit Court

This Retstraining Order was issued
at 9:41 A.M., on the 12th day of
January, 1979.

APPENDIX C

BOYD CIRCUIT COURT

DIVISION II

File No. 79-CI-014

HARRY KAUFMAN and
KEITH HAMNER, - - - - - - - *Plaintiffs,*

v.

MECO, INCORPORATED, - - - - - - *Defendant.*

ORDER — Filed October 13, 1980

IT IS HEREBY ORDERED that Motion on behalf of the defendant, Meco, Incorporated, to vacate order restraining arbitration and to compel submission to arbitration is hereby denied and the above styled action is continued on the trial docket for trial on Thursday, October 23, 1980, at the hour of 9:30 A.M.

This the 13th day of October, 1980.

(s) Charles S. Sinnette, Judge
Boyd Circuit Court, Division II

APPENDIX D

BOYD CIRCUIT COURT

DIVISION II

File No. 79-CI-014

HARRY KAUFMAN and
KEITH HAMNER, - - - - - - - *Plaintiffs,*

v.

MECO, INCORPORATED, - - - - - *Defendant.*

ORDER — Filed December 29, 1980

IT IS HEREBY ORDERED that the Order of this Court of October 13, 1980, is amended as follows:

Motion on behalf of Defendant, Meco, Incorporated, to vacate the Order restraining arbitration and to compel submission to arbitration is hereby denied.

IT IS FURTHER ORDERED that the Defendant, Meco, Incorporated, is enjoined from attempting to arbitrate the issues of this case and this action is set for trial on Monday, July 27, 1981, at the hour of 9:30 A.M.

This the 29th day of December, 1980.

(s) Charles S. Sinnette, Judge
Boyd Circuit Court, Division II

APPENDIX E

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 81-CA-111-I

MECO, INCORPORATED, - - - - - - *Appellant.*

v.

HON. CHARLES S. SINNETTE, Judge, Boyd Circuit Court, Div. Two;
HARRY KAUFMAN; and
KEITH HAMNER - - - - - - - *Appellees*

Appeal From Boyd Circuit Court
No. 79-CI-014

ORDER

BEFORE: HAYES, CHIEF JUDGE, VANCE and WILHOIT, JUDGES.

The Court, having considered the motion of Meco, Inc. for relief under CR 65.07, the response thereto, and being otherwise sufficiently advised, hereby ORDERS that said motion be, and it hereby is GRANTED, and the Boyd Circuit Court's Order of December 29, 1980, enjoining Meco, Inc. from attempting to arbitrate the issues of the case is hereby SET ASIDE, it appearing that there was no motion for temporary injunction and that no Findings of Fact and Conclusions of Law accompanied said Order.

The Court, having considered Meco, Inc.'s petition for writ of prohibition, the response thereto, and being otherwise sufficiently advised, hereby declines to rule on said petition, there being no findings sufficient to determine

whether the December 29, 1980 Order was granted because the contract itself did not require binding arbitration or because the Federal Arbitration Act was inapplicable.

ENTERED: February 9, 1981

(s) Roy N. Vance
Judge, Court of Appeals

APPENDIX F

BOYD CIRCUIT COURT

DIVISION II

File No. 79-CI-014

HARRY KAUFMAN and
KEITH HAMNER, - - - - - - - *Plaintiffs,*

v.

MECO, INC., - - - - - - - - *Defendant.*

FINDING OF FACT, CONCLUSION OF LAW AND ORDER — Filed January 16, 1981

This matter coming on before the Court on Motion for Temporary Injunction, the Court makes the following findings:

That the defendant by withdrawing its first request for arbitration has waived any rights to arbitrating the issues. That the delay which has taken place in bringing about any arbitration is further evidenced of bad faith on behalf of the defendant to arbitrate the matter and bring about immediate determination of the issues. There are facts involved in this case that could not be resolved by arbitration and must be resolved by a trial by jury. That an attempt to arbitrate the matter at this point will cause irreparable damage and a delay of the trial of the issues which may result in further damages to the plaintiffs. To prevent irreparable harm and damage a temporary injunction should be granted.

CONCLUSION OF LAW

Where the facts and the evidence of the case indicate one of the parties to a contract does not desire to arbitrate in good faith and such arbitration which is an attempt in a delayed manner and prior to a trial is not in good faith and irreparable harm will occur should there be a delay of the trial, then a temporary injunction should be granted.

ORDER

IT IS HEREBY ORDERED that Motion for Temporary Injunction is sustained and that the defendant is hereby temporarily enjoined from submitted the issues of the action or any controversy involving this contract to this American Arbitration Association.

Entered this the 16th day of June, 1981.

(s) Charles S. Sinnette, Judge
Boyd Circuit Court, Division II

APPENDIX G

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 81-CA-1251-I

MECO, INCORPORATED - - - - - - - *Movant*

v.

HARRY KAUFMAN;
KEITH HAMNER; and
HON. CHARLES S. SINNETTE, Judge, Boyd Circuit Court, Division Two - - - - *Respondents*

On Motion for 65.07 Relief from Boyd Circuit Court

ORDER

BEFORE: HOGGE, LESTER, and HOWERTON, JUDGES

Meco, Incorporated has moved this Court for relief pursuant to CR 65.07 and, in addition, has moved this Court for relief against the Hon. Charles S. Sinnette, Judge of the Boyd Circuit Court. The Court, having considered the matter and otherwise being sufficiently advised, ORDERS that the motions be, and hereby are, DENIED. The movant has failed to show that it will be irreparably injured by the failure of this Court to grant relief, and it appears that the movant has an adequate remedy by appeal in this case.

ENTERED: July 21, 1981

(s) E. M. Hogge
Judge, Court of Appeals

APPENDIX H

SUPREME COURT OF KENTUCKY

81-SC-599-MR

MECO, INCORPORATED - - - - - *Appellant*

v.

HON. CHARLES S. SINNETTE, Judge, Boyd Circuit Court, Division Two, and
HARRY KAUFMAN and
KEITH HAMNER - - - - - - *Appellees*

On Appeal From Court of Appeals
C. of A. #81-CA-1251-I

ORDER DENYING MOTION FOR RECONSIDERATION

Appellant's motion for reconsideration is denied.

Palmore, C. J., Aker, Clayton, Stephens, Stephenson and Sternberg, J. J., concur.

ENTERED January 12, 1982.

(s) John S. Palmore
Chief Justice

APPENDIX I

SUPREME COURT OF KENTUCKY

81-SC-599-MR

MECO, INCORPORATED - - - - - - *Appellant*

v.

HON. CHARLES S. SINNETTE, Judge, Boyd Circuit Court, Division Two, and
HARRY KAUFMAN and
KEITH HAMNER - - - - - - - *Appellees*

Appeal From an Original Action
in Court of Appeals

ORDER GRANTING STAY OF EXECUTION AND ENFORCEMENT OF OPINION

On motion of the appellant a stay of execution and enforcement of this Court's Memorandum Opinion and Order of October 13, 1981, which became final on January 12, 1982, is granted for a period to and including May 13, 1982, in order that appellant may make application to the Supreme Court of the United States for a writ of certiorari.

Any additional request for stay deemed necessary should be addressed to the Supreme Court of the United States.

Stephenson, Sternberg, Aker and Clayton, JJ., sitting. All concur.

ENTERED February 12, 1982.

(s) John S. Palmore
Chief Justice

APPENDIX J

THE AMERICAN INSTITUTE OF ARCHITECTS

AIA Document A101

STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONTRACTOR,

where the basis of payment is a Stipulated Sum

This Document has Important Legal Consequences: Consultation with an Attorney in Encouraged with Respect to Its Completion or Modification

Use only with the latest Edition of AIA Document A201, General Conditions of the Contract for Construction.

This document has been approved and endorsed by The Associated General Contractors of America.

AGREEMENT made this 3rd day of October in the year of Nineteen Hundred and Seventy-Seven

BETWEEN the Owner: Keith Hamner and Harry Kaufman, 191 College Street, West Liberty, Kentucky

and the Contractor: MECo, Inc. 2340 Rockford Lane, Louisville, Kentucky 40216

the Project: Coal Crushing and Loading Facility on U. S. Corps of Engineers, Mile—7.26 on Big Sandy River, Kentucky side.

the Architect: MECo, Inc.

The Owner and the Contractor agree as set forth below:

• • • • • • • •

7.10 ARBITRATION

7.10.1 All claims, disputes and other matters in question arising out of, or relating to, this Contract or the breach thereof, except as set forth in Subparagraph 2.2.9 with respect to the Consultant's decisions on matters relating to artistic effect, and except for claims which have been waived by the making or acceptance of final payment as provided by Subparagraphs 9.7.5 and 9.7.6, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

7.10.2 Notice of the demand for arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association, and a copy shall be filed with the Consultant. The demand for arbitration shall be made within the time limits specified in Subparagraphs 2.2.10 and 2.2.11 where applicable, and in all other cases within a reasonable time after the claim, dispute or other matter in question has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.

7.10.3 The Contractor shall carry on the Work and maintain the progress schedule during any arbitration proceedings, unless otherwise agreed by him and the Owner in writing.

APPENDIX K

[LETTERHEAD OF METROPOLITAN ENGINEERING COMPANY, INC.]

June 26, 1979

American Arbitration Association
2308 Carew Tower
Cincinnati, Ohio 45202

Attn: Ms. Gail T. Fischer
Tribunal Administrator

Re: 52 10 0090-78
Metropolitan Engineering Co., Inc.
Louisville, Ky.

—and—

Keith Hamner & Harry Kaufman
Greenup, Ky.

Dear Gail:

I request that the above mentioned case be withdrawn from arbitration. Thank you for your assistance in this matter.

Sincerely yours,
MECo, INC.
(s) Joseph P. Dooley
President

JPD/jjb

cc: John McGinnis, Esq.
Attorney for Respondent
McGinnis, Leslie & Johnson
Braden Building
Greenup, Ky. 41144

APPENDIX L

BOYD CIRCUIT COURT

DIVISION II

Civil Action No. 79-CI-014

HARRY KAUFMAN and
KEITH HAMNER, - - - - - - - *Plaintiffs,*

v.

MECO, INCORPORATED, - - - - - *Defendant.*

SUPPLEMENTARY AFFIDAVIT OF JOSEPH P. DOOLEY

The undersigned affiant, Joseph P. Dooley, after first being duly sworn, deposes and states as follows, to-wit:

1. That the affiant, Joseph P. Dooley, is president and chief managing officer of the defendant corporation, Meco, Incorporated.

2. That the affiant has read plaintiffs' Response to defendant's Motion for arbitration.

3. That a request for arbitration was filed by affiant on October 10, 1978. Suit was thereafter instituted by plaintiffs to restrain the arbitration on January 12, 1979. Affiant filed a timely demand for enforcement of the arbitration agreement in his Federal Court Response on January 2, 1979. Contrary to the assertion in plaintiffs' Memorandum, to his knowledge affiant has heretofore never been afforded a hearing on his demand for arbitration.

4. With regard to affiant's letter to the American Arbitration Association of June 26, 1979, requesting that the

case be withdrawn from arbitration, the following facts should be considered which gave rise to this letter:

(a) Affiant believed that the controversy had been amicably settled in the spring of 1979. The case had been remanded from Federal Court by Agreed Order in May of 1979. Exhibit "A", a check in the face amount of One Hundred Thousand ($100,000.00) Dollars had been tendered to affiant by plaintiff Kaufman in partial settlement (returned for insufficient funds). Exhibits "B" and "C" are letters from the American Arbitration Association of March 1, 1979 and June 18, 1979, reflecting that the matter was being held in abeyance by "mutual request". Exhibit "D" is a letter from the American Arbitration Association of June 29, 1979 reflecting advises that the dispute had been settled. Exhibit "E" is a draft Agreed Judgment tendered to affiant by plaintiffs then lawyer, John McGinnis, in the fall of 1979. Exhibit "F" is a letter from affiant's counsel to the plaintiffs and their counsel dated September 25, 1979, reflecting settlement of the controversy.

(b) By requesting that the case be withdrawn from arbitration in June of 1979, affiant understood that significant fees could be saved without affiant prejudicing his right to reinstitute the arbitration proceedings at a later time if the settlement fell through. Affiant has verified that the arbitration can be reinstituted and heard by the American Arbitration Association at this time, under the same file number without prejudice to either party.

5. Settlement negotiations broke down in October of 1979. Affiant immediately instructed his attorney to renew necessary action on his claim against plaintiffs which has continued to date. Reference is hereby made to affiant's previous affidavits tendered herein on March 5, 1980 and July 30, 1980 (Docket Items 22 & 31).

6. The purpose of the loading facility which is the subject of this litigation was to place coal directly into barges on a navigable waterway for shipment to points primarily outside of the Comonwealth of Kentucky. Because the facility extended into a navigable waterway, proper authorization for and approval of the project was requested and received by the U. S. Army Corp of Engineers.

7. Exhibit "G" is a listing of unpaid subcontractors and vendors as of the date of the Addendum to Contract entered into by the parties to this litigation on July 11, 1978, Exhibit to plaintiffs' Complaint, comprising approximately 80% of all subcontractors and vendors involved in the construction project. Exhibit "H" is a listing of all out of state vendors which, by dollar volume, amounts to approximately 71% of the total subcontractors on the project. Not including in this listing are contracts for out of state vendors used for structural steel in place in the Big Sandy River and for certain cast iron components of the projects coal crusher.

More specifically, starting at one and of the loading facility and working to the other end:

a. Hopper steel components were fabricated in Ohio;

b. The feeder was fabricated in Indiana;

c. Conveyor belts no. 1 and no. 2 were fabricated in Alabama;

d. The idlers were fabricated in Illinois;

e. The reducer head pully pillar block assembly was fabricated in Indiana;

f. The grisley was fabricated in West Virginia;

g. The crusher was fabricated in Missouri;

h. The main driver motor was fabricated in Illinois;

i. The loading chute was fabricated in West Virginia;

j. The motor assembly and drive gear were fabricated in West Virginia;

k. The barge puller was fabricated in Ohio;

l. The drive cables were fabricated in Wisconsin;

m. The motor control center was fabricated in Michigan;

n. Conduit and wiring were purchased in West Virigina; and

o. Steel placed in the Big Sandy River was fabricated in West Virginia.

8. Exhibit "I" is a listing of names and addresses of employees who worked on the project. 21% of these employees resided outside of Kentucky. Many of these employees traveled across state lines twice each day to work on the construction facility.

9. Financing for the project was obtained by plaintiffs Kaufman and Hamner through a bank in Ohio.

10. Negotiations for the design and construction of this facility took place, in part, at the site of a similar facility designed and built by affiant on Coal Grove, Lawrence County, Ohio.

11. Affiant strongly believes that he has been significantly damaged by the actions of plaintiffs and their refusal to remit the balance owed him for the construction of the coal loading facility.

This 3rd day of October, 1980.

(s) Joseph P. Dooley

COMMONWEALTH OF KENTUCKY
COUNTY OF BOYD

Subscribed and sworn to before me by Joseph P. Dooley, this 3rd day of October, 1980.

(s) Teresa Meadows Gillum
Notary Public, State at Large, KY
My Commission expires: 8/4/81.

I hereby certify that a true copy of the foregoing was hand delivered to Hon. Henry Wilhoit, attorney for plaintiff, this 3rd day of October, 1980.

(s) C. D. Edwards, Jr.
of Counsel for Meco, Incorporated

[LETTERHEAD OF AMERICAN ARBITRATION ASSOCIATION)

March 1, 1979

Joseph P. Dooley, President
Meco, Inc.
P.O. Box 58158
Louisville, KY 40258

John McGinnis, Esq.
Attorney for Respondent
McGinnis, Leslie & Johnson
Braden Building
Greenup, KY 41144

RE: 52 10 0090-78
Metropolitan Engineering Co., Inc.
Louisville, KY

—and—

Keith Hamner & Harry Kaufman
Greenup, KY

Gentlemen:

At your mutual request, the Association has been holding the above-mentioned case in abeyance since January 15, 1979. At this time, we request that you inform us in writing whether you desire that we continue to hold this matter in abeyance, proceed with its administration, or whether you wish to have it withdrawn from arbitration.

Cordially yours,
(s) Gail T. Fischer
Tribunal Administrator

GTF/twg

[LETTERHEAD OF AMERICAN ARBITRATION ASSOCIATION)

June 18, 1979

Joseph P. Dooley, President
Meco, Inc.
P.O. Box 58158
Louisville, KY 40258

John McGinnis, Esq.
Attorney for Respondent
McGinnis, Leslie & Johnson
Braden Building
Greenup, KY 41144

RE: 52 10 0090-78
Metropolitan Engineering Co., Inc.
Louisville, KY

—and—

Keith Hamner & Harry Kaufman
Greenup, KY

Gentlemen:

At your mutual request, the Association has been holding the above-mentioned case in abeyance since March 1, 1979. At this time, we request that you inform us in writing whether you desire that we continue to hold this matter in abeyance, proceed with its administration, or whether you wish to have it withdrawn from arbitration.

Cordially yours,
(s) Gail T. Fischer
Tribunal Administrator

GTF/teg

[LETTERHEAD OF AMERICAN ARBITRATION ASSOCIATION)

June 29, 1979

Joseph P. Dooley, President
Meco, Inc.
P.O. Box 58158
Louisville, KY 40258

John McGinnis, Esq.
Attorney for Respondent
McGinnis, Leslie & Johnson
Braden Building
Greenup, KY 41144

RE: 52 10 0090-78
Metropolitan Engineering Co., Inc.
Louisville, KY

—and—

Keith Hamner & Harry Kaufman
Greenup, KY

Gentlemen:

This will acknowledge receipt of advice from Mr. Dooley that the above mentioned matter has been settled.

The Association considers the matter settled and has so marked its file. Any administrative fees that are still outstanding remain due and payable.

Sincerely yours,
(s) Gail T. Fischer
Tribunal Administrator

GTF/twg
CC: Arbitrators Kiel, Eady & Horne

APPENDIX M

BOYD CIRCUIT COURT

DIVISION II

HARRY KAUFMAN, Et Als.

v.

MECO, INC.

Case No. 79-CI-014

CERTIFICATION OF COURT RECORDS

I, Russell E. Compton, Clerk of the Circuit Court, do certify that the following are true and correct copy(s) of the Civil Docket Sheets as recorded in the Office of the Circuit Clerk of Boyd County.

In TESTIMONY WHEREOF witness my hand as Clerk aforesaid, this the 14 day of January, 1981.

Russell E. Compton
Clerk

(s) By: Rita Bloebaum, D.C.

DOCKET ENTRIES

1/12/79	Complaint for $750,000/Summons and copy issued for def. by the Jefferson Co. Sheriff (given to attorney)
1/12/79	Notice Assigning to Judge, Div. II/copy mailed to McGinnis
1/12/79	Restraining Order issued at 9:40 am/Original and copies given to attorney with Summons to mail to the Sheriff of Jefferson Co.
1/12/79	Bond for $1000/copy with summons
1/23/79	RTN Executed Restraining Order on Meco Inc. by the Jefferson Co. Sheriff 1/17/79
1/23/79	RTN Executed Summons on Meco Inc. by serving Joe Dooley by the Jefferson Co. Sheriff 1/17/79
2/ 2/79	Petition for Removal of Petition to United States District Court
2/ 2/79	Bond for Removal
2/ 2/79	Certificate
5/29/79	Copy of Order remanding back to Boyd Circuit Court
10/ 2/79	Motion of Def. to file late Answer and Counterclaim/noticed 10/5/79
10/ 9/79	Notice for rescheduling 10/12/79
10/15/79	Order setting for hearing to file Late Answer and Counterclaim 10/26/79 at 2:30 pm/copies mailed to McGinnis and J. Vincent
10/16/79	Motion of counsel for def. to substitute counsel/ noticed 10/19/79
10/19/79	Order substituting Jerry P. Vincent as counsel for the Defendant. cm to Vincent, Cleveland and McGinnis

1/21/80 Lis Pendens Notice filed by Meco, Inc.

1/25/80 Motion of Def. for hearing on filing Counterclaim/noticed 2/1/80

2/ 1/80 Order setting for hearing 2/20/80 at 11:00 am/ copies mailed to McGinnis and Vincent

2/11/80 Motion to be relieved of counsel

2/11/80 Order sustaining removing John R. McGinnis as counsel for Plaintiffs/copies mailed to McGinnis, Hamner and Vincent

2/11/80 Order continuing til 3/5/80 at 9:00 am/copies mailed to Wilhoit and Vincent

3/ 5/80 Affidavit of Joseph P. Dooley

3/20/80 Letter to Judge Sinnette from Jerry Vincent with copy of Affidavit and Copy of Answer attached

3/20/80 Response of Plaintiffs to motion

3/25/80 Order to file tendered Answer and denying motion to file Counterclaim/copies mailed to Wilhoit and Pruitt

5/ 1/80 Motion of Plaintiff for trial/noticed 5/9/80

5/ 9/80 Order setting for trial by jury 10/23/80 at 9:30 am and to pay jury fee/copies mailed to Wilhoit and Pruitt

5/13/80 Affidavit of Jerry Vincent

5/13/80 Motion of Petitioner to withdraw/noticed 5/16/80

5/16/80 Order sustaining and giving Def. 30 days to secure new counsel/copies mailed to Vincent, Wilhoit, Marshall, Dooley, and Schenn

7/30/80 Memorandum in Support of Motion to vacate by Def., Meco, Inc.

7/30/80	Motion of Def. to Vacate Order Restraining Arbitration and to Compel Submission to Arbitration/8/8/80
9/ 9/80	Order—Setting for hearing 10/3/80 at 11:00 a.m. cm to Wilhoit Marshall and Schemm
9/10/80	Plaintiff's response to defendant's motion for arbitration
9/18/80	Copy of Letter
9/19/80	Letter
10/ 2/80	Supplementary Memorandum in Support of Motion to Vacate Order Restraining Arbitration and to compel submission to arbitration
10/ 3/80	Affidavit of Jim Hicks
10/ 3/80	Affidavit of Lowell Wright
10/ 3/80	Affidavit of George Arrington
10/ 3/80	Supplementary Affidavit of Joseph P. Dooley
10/ 3/80	Order Dissolving Mechanic's Lien and Surety Bond/3 copies to Wilhoit and 2 copies to Edwards
10/13/80	Order continuing trial 10/23/80 at 9:30 am/ copies mailed to Wilhoit, Ratterman and Edwards
10/14/80	Motion of Def., for continuance/noticed 10/17/80
10/17/80	Order setting for trial by jury (continuing till further orders/copies mailed to Wilhoit, Ratterman and Edwards
12/29/80	Letter
12/29/80	LETTER
12/29/80	Order setting for trial 7/27/81 at 9:30 am/copies mailed to Wilhoit, Ratterman and Edwards

APPENDIX N

TITLE 9, UNITED STATES CODE, §§ 1-4

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.
July 30, 1947, c. 392, 61 Stat. 670.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
July 30, 1947, c. 392, 61 Stat. 670.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

July 30, 1947, c. 392, 61 Stat. 670.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the

agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

July 30, 1947, c. 392, 61 Stat. 671; Sept. 3, 1954, c. 1263, § 19, 68 Stat. 1233.

Opposition

81-1871

No.

Office - Supreme Court, U.S.
FILED
MAY 14 1982
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MECO, INCORPORATED, Petitioner

versus

HONORABLE CHARLES S. SINNETTE,
Judge, Boyd Circuit Court, Division II
and
HARRY KAUFMAN and
KEITH HAMNER, - - - - - Respondents

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

H. GENE BALDRIDGE
JAMES H. MOORE III
BALDRIGE AND MOORE, P.S.C.
1924 Carter Avenue
P. O. Box 247
Ashland, Kentucky 41101
Telephone: (606) 329-9678
Attorneys for Respondents

WESTERFIELD-BONTE CO., 319 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTIONS PRESENTED

1. Whether the opinions of the courts of the Commonwealth of Kentucky of which Petitioner seeks review constitute a final judgment or decree rendered by the highest court of the Commonwealth of Kentucky of which a decision could be had sufficient to vest jurisdiction of this matter in the United States Supreme Court pursuant to 28 U.S.C. § 1257?

2. Whether the courts of the Commonwealth of Kentucky have misinterpreted the provisions of the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and if so whether such error, if any, constitutes a violation of the Supremacy Clause (Article VI, Clause 12) and/or the Commerce Clause (Article I, § 8) of the United States Constitution?

3. Whether the appellate courts of the Commonwealth of Kentucky have violated the Due Process Clause (Fourteenth Amendment, § 1) of the United States Constitution by denying Petitioner the extraordinary interlocutory relief sought on the grounds that Petitioner had not demonstrated irreparable harm and that an adequate remedy of any errors asserted existed by way of appeal from any adverse final judgment?

4. Whether any conflict that might exist between federal circuit courts regarding the applicability of the provisions of Section 3 of the Federal Arbitration Act to state court proceedings would be resolved by review of this case?

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondents accept the Petitioner's statement of the Federal Constitutional and Statutory provisions involved with the addition of the asserted jurisdictional statute: 28 U.S.C. § 1257.

28 U.S.C. § 1257 provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States.
>
> "For the purposes of this section, the term 'highest court of a state' includes the District of Columbia Court of Appeals."

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

MECO, INCORPORATED, - - - - *Petitioner*

v.

HONORABLE CHARLES S. SINNETTE, Judge,
Boyd Circuit Court, Division II and
HARRY KAUFMAN and
KEITH HAMNER, - - - - *Respondents*

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Respondents pray that the Writ of Certiorari to review the Order of the Supreme Court of Kentucky entered herein on October 13, 1981, be denied.

OPINIONS BELOW

Respondent accepts the Petitioner's statement of the opinions relevant to the determination of the Writ applied for, although only the October 13, 1981 Order of the Supreme Court of Kentucky is technically before the Court.

JURISDICTION

Respondent asserts that this Court lacks jurisdiction of this case because the jurisdictional basis asserted by the Petitioner, 28 U.S.C. § 1257(3), does not grant jurisdiction to this Court to review non-final interlocutory orders of a state court where such judgment does not constitute a final adjudication of the asserted federal right by the highest state court that could hear the case. Respondents will set forth their argument that this Court lacks jurisdiction to hear this case more fully in the argument section of this Brief in Opposition.

COUNTERSTATEMENT OF THE CASE

On October 3, 1977, Petitioner, MECO, Incorporated (MECO) entered into a "form" type contract with Respondents, Harry Kaufman (KAUFMAN) and Keith Hamner (HAMNER) for construction by MECO of a coal crushing and loading facility in Boyd County, Kentucky, on the banks of the Big Sandy River on property leased to KAUFMAN and HAMNER. This contract included an arbitration clause "enforceable under prevailing arbitration law."

During 1978, various disputes arose between MECO and KAUFMAN and HAMNER; however, rather than invoke the arbitration provision of the contract, MECO chose to enter into an agreement dated April 3, 1978, styled an "Addendum" to the October 3, 1977 contract, purporting to settle the rights and obligations of the parties in dispute and providing a method other than arbitration for resolution of disputes of certain types

that might arise (reference to the work performed on another job site).

Additionally, the April 3, 1978 agreement provided for an increase in the contract price to MECO, Inc.; the method of payment; waiver of liquidated damages accruing under the original contract; a bonus to MECO, Inc. of five hundred ($500.00) dollars per day for completion prior to a certain date and liquidated damages payable by MECO for failure to complete the project within ninety (90) days; a full compromise, release and waiver of all liquidated damages accruing to April 3, 1978; and finally MECO further agreed to release, relinquish and waive any cause of action or damages, past or present, up to the time of the Addendum.

On July 11, 1978, an additional agreement was entered into. This agreement addressed itself to a settlement of extras performed by MECO and became a full compromise and settlement of all claims it had for additional monies due by reason of certain extras being performed.

Despite the contractual agreement for the resolution of the disputed matters, MECO failed to comply with the terms of said agreement and on October 11, 1978, filed a demand for arbitration with the American Arbitration Association (AAA).

Prior to the institution of state court proceedings, on October 27, 1978, MECO, pursuant to Kentucky law, caused a lien for the contract price in dispute to be filed against title to lands of KAUFMAN and HAMNER's Lessor upon which the construction project was situate.

On January 11, 1979, KAUFMAN and HAMNER filed a civil action in the Boyd County, Kentucky Circuit Court against MECO, Inc. In that civil action, KAUFMAN and HAMNER alleged that MECO had breached both the October 3, 1977 contract as amended and the 1978 Addendum agreement, and had waived any right to arbitration before the AAA that might have existed by the 1978 Addendum agreement, by the breach of such agreement and by their invocation of the jurisdiction of the courts of the Commonwealth of Kentucky through MECO's assertion of a lien against the real property on which the construction project was situate. KAUFMAN and HAMNER prayed for an Order adjudging MECO to have breached the aforestated contracts and forfeited its rights thereunder, granting money damages to KAUFMAN and HAMNER in the amount of seven hundred and fifty thousand ($750,000.00) dollars, setting aside the lien asserted by MECO against the aforestated real property, and restraining MECO from proceeding in the arbitration proceedings pending before the AAA.

The Boyd Circuit Court issued the Restraining Order sought on January 11, 1979, at 9:41 a.m.

On February 2, 1979, MECO filed in the United States District Court for the Eastern District of Kentucky a Petition for removal of the Boyd Circuit Court action to said United States District Court based upon an allegation of diversity of citizenship. MECO also tendered to the U. S. District Court an answer to the Complaint of KAUFMAN and HAMNER consisting of a denial of most of the actionable allegations

of the Complaint and setting up an affirmative defense of arbitration; however, no motion or other action to compel arbitration was taken in such federal court action.

KAUFMAN and HAMNER subsequently filed a Response in the U. S. District Court denying MECO's allegations as to their citizenship and moving the Court for an Order of Remand on the ground that the U. S. District Court lacked jurisdiction.

The issue of jurisdiction was referred to United States Magistrate, Joseph M. Hood, who, after conducting a hearing, ordered that the case be remanded to the Boyd Circuit Court on May 24, 1979.

On June 26, 1979, MECO, Inc., through its President, Joseph P. Dooley, unconditionally requested, by letter to the AAA, that MECO's demand for arbitration be withdrawn. It is worth noting that this letter requested a withdrawal of the matter from arbitration and contained no reference to a request that the matter be held in abeyance as is submitted by Petitioner. The AAA, by letter dated June 29, 1979, acknowledged the withdrawal of the request for arbitration and indicated that it had so marked it files.

On October 2, 1979, MECO moved the Boyd Circuit Court for leave to file an untimely answer and counterclaim against KAUFMAN and HAMNER. After a hearing on the motion, Judge Sinnette of the Boyd Circuit Court ordered the answer filed but denied the motion to file the counterclaim.

MECO, in its tendered answer, raised various factual defenses to the Complaint herein but did not af-

firmatively plead the arbitration defense as an affirmative answer, nor was its tendered answer accompanied by any motion to compel arbitration. In fact, MECO's answer was joined with a tendered counterclaim which sought to assert a cause of action against KAUFMAN and HAMNER for alleged damages in excess of four hundred thousand ($400,000.00) dollars.

On January 21, 1980, MECO filed a Lis Pendens Notice in the office of the Clerk of the Boyd County Court, pursuant to Kentucky law, asserting a lien against the real property on which the construction project was situate, in the amount of three hundred thirty-one thousand thirty-one ($331,031.00) dollars, describing the action in which the lien was asserted as the aforereferenced Boyd Circuit Court action.

On March 25, 1980, the Boyd Circuit Court entered an Order permitting MECO's answer to be filed but denying leave to file the counterclaim with the case set for trial on October 23, 1980, a year after MECO tendered its answer on the merits and sought to assert a counterclaim for damages, placing liens of record relating thereto, on July 30, 1980, MECO filed a motion to dissolve the Restraining Order of January 11, 1979, and to submit the case to arbitration. This matter came before the Court for hearing and on October 3, 1980, Judge Sinnette entered an Order denying this motion and enjoining MECO from attempting to return the issues to arbitration.

Thereafter, MECO appealed the denial of its motion to dissolve the Restraining Order to the Kentucky Court of Appeals which ordered the Restraining Order

dissolved on procedural grounds, it appearing that at the time of the Circuit Court hearing on the motion to dissolve there was not a motion for temporary injunction pending and the Court failed to enter its Findings of Fact and Conclusion of Law with its Order, all in contravention of Rule 65 of the Kentucky Rules of Civil Procedure. The Court of Appeals declined to rule on MECO's motion for issuance of a Writ of Prohibition since there were no Findings of Fact sufficient to determine the purported basis of the Circuit Court's Order.

KAUFMAN and HAMNER then moved for a temporary injunction enjoining MECO from proceeding with arbitration asserting as grounds for such motion: (1) that MECO had waived its right to arbitration; and (2) that the 1978 agreement constituted a novation of the October 3, 1977 agreement, thus precluding the existence of any right to arbitration.

After a hearing on these matters, Judge Sinnette found that MECO had waived any right to arbitration and accordingly again issued a temporary injunction enjoining MECO from submitting its dispute with KAUFMAN and HAMNER to arbitration, said Order being dated June 16, 1981.

MECO continued to actively participate in the Circuit Court proceedings by noticing discovery depositions of KAUFMAN and HAMNER and subpoenaing extensive records relating to these depositions subsequently to the issuance of the temporary injunction.

Nonetheless, MECO filed a Petition with the Court of Appeals of the Commonwealth of Kentucky requesting interlocutory relief from the Temporary Injunction of June 16, 1981, pursuant to Rule 65.07 of the Kentucky Rules of Civil Procedure, on July 2, 1981, requesting the Court of Appeals to order the Temporary Injunction dissolved for error of the Trial Judge is issuing such injunction.

The Court of Appeals declined to grant the relief requested by MECO on July 21, 1981, holding that MECO had failed in its burden to show the irreparable harm necessary for extraordinary interlocutory relief since an adequate remedy by appeal existed.

MECO appealed the Court of Appeals' ruling to the Kentucky Supreme Court. On October 13, 1981, the Kentucky Supreme Court affirmed the Order of the Court of Appeals in a Memorandum Opinion and Order finding no reason to disturb the ruling of the Court of Appeals to the effect that MECO, Inc. has an adequate remedy by appeal.

MECO filed a timely Motion for Reconsideration to the Supreme Court of Kentucky which was denied on the 12th day of January, 1982. Thereafter, the Petition for Writ of Certiorari was filed herein.

Meanwhile, nearly three and one-half years after the institution of this action in Boyd Circuit Court, the determination of the merits of this case by the Boyd Circuit Court is stayed by Order of the Supreme Court of Kentucky dated February 12, 1982, while MECO asserts a claimed right to arbitration that it first raised in July of 1980, eighteen months after the filing of the

action, nearly one year after attempting to file a counterclaim for damages in the state court action and asserting liens against various property in support thereof.

ARGUMENT

I. This Court Lacks Jurisdiction to Review This Case Pursuant to 28 USC § 1257.

It is axiomatic and unnecessary of citation that the United States Supreme Court, as a court of limited jurisdiction, has jurisdiction to hear only those cases with which the United States Constitution or the Acts of Congress vest it with jurisdiction.

28 USC §1257 defines the jurisdiction of this Court with respect to review of action of state court tribunals stating that:

> "Final Judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of it being repugnant to the Constitution treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution treaties or statutes of, or commission held or authority exercised under the United States."

The Petitioner submits that the denial of its claimed federally guaranteed right to arbitration by the state court vests this Court with jurisdiction to hear and review this case pursuant to 28 USC §1257. It is clear, however, without consideration of the merits of Petitioner's claim of a denial of federally assured rights, that this Court lacks jurisdiction because the purported denial of such rights by the state court does not constitute a final judgment as to the asserted federal right by the highest court of the state in which review might be had.

The finality requirement for review of state court decisions is not a trifling technicality but rather is an integral part of American federalism. Mr. Justice Frankfurter, writing in *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 65 S. Ct. 1475, 89 L. Ed. 2092 (1945), stated the importance of the principle of finality thusly:

> "This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a state court. Here we are in the realm of a potential conflict between the courts of two governments. And so, ever since 1789, Congress has granted this Court the power to intervene in state litigation only 'after the highest court of which a decision in the suit could be had' has rendered a 'final judgment or decree.' (Citation omitted) This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW, supra,* at p. 124.

Additionally, the finality requirement serves the important ends of: (1) judicial economy through avoidance of piecemeal litigation, (2) the avoidance of advisory opinions in contravention of the Article III case or controversy requirement, and (3) minimization of federal intrusion into state affairs. *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores,* 414 U. S. 156, 94 S. Ct. 407, 38 L. Ed. 2d 379 (1973).

Originally, the finality rule was stated to require finality in two senses: that the decision be subject to no further review or correction in any other state tribunal and that it was final as an effective termination of the litigation and not of merely interlocutory or intermediate steps therein. *Market St. Ry. Co.* v. *Railroad Commission,* 324 U. S. 548, 65 S. Ct. 770, 89 L. Ed. 1171 (1945). The determination of finality, however, is controlled by federal law, not the state law classification.

Formerly, it appears that a decision of the highest state court either dissolving or affirming the issuance of a temporary injunction, leaving final disposition of the permanence of the injunction to a trial court, was not final for the jurisdictional purposes of §1257. Stern and Grossman, *Supreme Court Practice,* §3.14 (4th ed., 1969). But the rule that has since evolved has established that the designation by a state court of an injunction as temporary or interlocutory does not bar a finding of finality under federal law for jurisdictional purposes where the state court order has adversely determined the merits of the federally asserted right, is indefinite in duration, and the circumstances

indicate that there will be no consideration of modification. Vol. 12, J. Moore, *Federal Practice and Procedure,* §508.01(a).

Accordingly, this Court has reviewed temporary or interlocutory orders under certain conditions, and Respondents quarrel neither with the rule or the categories of cases in which such technically interlocutory orders have been reviewed. Rather, Respondents assert that this case does not fall within the recognized exceptions to the finality rule because the highest court of the State of Kentucky has not yet addressed the Petitioner's complaints on the merits and for this Court to review this case now would be an unnecessary intrusion into the orderly process of adjudication by the courts of the Commonwealth of Kentucky.

In *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975), this Court recognized that exceptions to an absolute technical interpretation of the finality jurisdictional limitation existed and that they could be placed into four categories. These categories represent classes of cases in which this Court has jurisdiction to decide federal issues raised in state court proceedings despite the fact that further proceedings remain in the courts below.

The first category delineated by the Court in *Cox, supra,* is those cases where, although further proceedings, even entire trials, remain in the courts below, the case is for all practical purposes concluded because the judgment of the state court on the federal issue is deemed final. *Cox Broadcasting, supra,* at p. 479. The leading example of this category of case given was

Mills v. *Alabama,* 384 U. S. 214, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966), a criminal case in which a demurrer to a criminal prosecution on federal grounds that was sustained by the trial court was reversed by the highest state court and remanded for trial although no factual defense existed.

The second category of exception set forth in *Cox, supra,* includes cases in which the federal issue finally decided by the highest state court will remain for decision regardless of the outcome of further state court proceedings. *Radio Station WOW, supra,* which involved federal questions already decided by the highest state court although a remand for an accounting remained to be undertaken, is an example of this category of exceptions to the finality rule, since regardless of the outcome of the accounting the federal questions would remain for determination.

The third category of exceptions to the finality rule involved cases where the further state court proceeding will not preserve the federal question for review, as in *California* v. *Stewart,* 384 U. S. 436, 86 S. Ct. 1602, 10 L. Ed. 2d 974 (1966) in which a state court reversed a criminal conviction on federal constitutional grounds and remanded the case for trial. This Court determined that review of the federal question was appropirate because it was obvious that if the defendant was convicted, the determination of the federal issue adversely to the state would be moot, and if the defendant won an acquittal, the prevailing state law would forbid a review of the determination of the federal issue.

The final category of exceptions to the finality rule include those cases where the federal issue has been finally decided by the state courts with further proceedings pending in which the party seeking review might prevail on non-federal grounds thus rendering unnecessary review of the federal issue by this Court and where reversal of the state court on the federal issue could be preclusive of any further litigation, as in *Construction Laborers* v. *Curry,* 371 U. S. 542, 83 S. Ct. 537, 9 L. Ed. 2d 514 (1963), in which the Court reviewed the affirmance by the highest state court of a temporary injunction against picketing by strikers over claims that the National Labor Relations Board has exclusive jurisdiction for two reasons: (a) because postponing review would seriously erode the National Labor policy of requiring exclusive jurisdiction in the Board and not the state courts and (b) because the Court was convinced that the Board had no defense to the entry of a permanent injunction other than the claim of preemption.

None of the four categories of cases exempted from the ordinary finality rule are applicable to the case at bar.

The first exception, where the determination of the federal issue is dispositive of the case or the outcome preordained, is not applicable. The federal right asserted by the Petitioner is its claimed right to have the disputed issues between it and KAUFMAN and HAMNER submitted to binding arbitration pursuant to the arbitration clause of the 1977 contract and the Federal Arbitration Act, 9 USC §§1-4.

The Respondents have sought damages for breach of contract in the state court action alleging a breach of the relevant contracts and have alleged that the asserted right to arbitration has been waived.

The Federal Arbitration Act provides in Sec. 2 that an arbitration clause of a contract is ". . . valid, irrevocable, and enforcable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Sec. 3 of the Act provides that in suits brought in federal courts on issues referable to arbitration, the court in which such action is brought should stay the court proceedings if the party so moving ". . . is not in default in proceeding with such arbitration."

Sec. 4 of the Act provides for an independent federal action to require submission of disputes to arbitration provided that such court determines there is no default or waiver on the part of the party demanding arbitration.

However, the procedure established by the Act allowing a Federal District Court to order arbitration does not vest the federal courts with exclusive jurisdiction to determine the propriety of an order for arbitration. In seeking an order to compel arbitration in a Federal District Court, the party attempting to assert such a right must establish an independent jurisdiction basis such as diversity. *In re Mercury Const. Corp.*, 656 F. 2d 933 (4th Cir. 1981). In fact, the provisions of the Act are enforcable in state as well as in federal courts, although in either jurisdiction the

law to be applied is the substantive federal law. *In re Mercury Const. Corp., supra.*

Prior to the initiation of any state court action, MECO asserted a lien against real property arising out of the dispute it contends is subject to arbitration. Thereafter, HAMNER and KAUFMAN brought an action in State Court for damages and other relief alleging among other things that the purported arbitration clause was invalid because of waiver and novation, and asking that the lien be dissolved. MECO purported to remove the case to the United States District Court on the basis of diversity jurisdiction and set up an answer in the District Court defending on grounds including among others, that the arbitration remedy was exclusive. MECO did not, however, move to compel submission of the dispute to arbitration in the District Court case. The case was remanded to the Boyd Circuit Court because diversity jurisdiction did not exist.

Upon remand to the state court, MECO filed an answer and tendered a counterclaim against Respondents for damages and did not move to compel arbitration in the state court until one year after it had tendered its answer and counterclaim.

Under federal law, waiver of the right to arbitration may consist of two types: (1) a waiver that occurs when one actively participates in a law suit or takes other actions inconsistent with the right to arbitration, *N and D Fashions, Inc.* v. *DMJ Industries,* 548 F. 2d 722 (8th Cir. 1976), *Chatham Shipping* v. *Fertex Steamship Corp.,* 352 F. 2d 291 (2nd Cir. 1965); and

(2) where the waiver is based on a type of laches or delay in seeking arbitration. *Trafalgar Shipping Co.* v. *International Milling Co.*, 401 F. 2d 568 (2nd Cir. 1968).

KAUFMAN and HAMNER, in their State Court Complaint, asserted waiver on the part of MECO through the invocation of the substantive law of the Commonwealth of Kentucky through the filing of a Materialman's Lien against the real property upon which the subject construction project was located. The Boyd Circuit Court issued a Temporary Restraining Order on the basis of the verified allegations of the Complaint.

MECO, after remand to the state court, failed to raise in its Answer or by Motion its position that arbitration should be compelled until nearly eighteen months after the filing of the state court action and then by Motion, MECO submitted to the jurisdiction of the Boyd Circuit Court the question whether sufficient evidence of waiver under the federal substantive law existed to support a Restraining Order. MECO, in the period between the filing of the action and the various hearings on motions to dissolve the restraining order or to grant a temporary injunction, took actions subjecting it to the "laches" type of waiver by withdrawing its arbitration demand from the AAA and by failing to timely move to compel arbitration, and to the active participation type of waiver by tendering its answer and counterclaim in the state court action.

Both the delay in asserting arbitration and the inconsistent actions in the state court case are grounds, under federal law, to refuse to grant arbitration.

In the case of *E. C. Ernst, Inc.* v. *Manhatten Const. Co. of Texas,* 551 F. 2d 1026, 1039 (C.A. 5th Cir.) (1977), a somewhat similar situation presented itself. The complaint was filed on October 28, 1970. The answer was filed on December 16, 1970, and arbitration was mentioned only as a ground for dismissing the complaint. The parties litigated for two and one-half years. There was discovery, cross-claims and there were motions filed. In May, 1973, arbitration was first asserted as the sole remedy. The district court had found that there was a waiver of rights to arbitration and this finding was upheld on appeal to the Fifth Circuit.

Upon dissolution of the Restraining Order, the matter of a temporary injunction was brought on before the state trial court on the grounds of waiver and after making appropriate Findings of Fact and Conclusions of Law, the state court determined that KAUFMAN and HAMNER had a sufficient chance of success on the merits on the waiver issue at trial under the substantive law to justify a temporary injunction.

MECO sought appellate review of this decision by the state courts but was denied relief, not on the merits, but under state procedural law because MECO failed to establish the irreparable harm and absence of an adequate remedy for review of the adverse determinations by appeal on the merits necessary under state law for the granting of the extraordinary relief sought.

During the pendency of the appellate review, MECO continued its active participation in the state court by noticing discovery and serving two subpoenas deuces tecum.

Accordingly, the first exception set forth by Justice White in *Cox Broadcasting, supra,* that the determination of the federal issue is conclusive of the litigation is not applicable for two reasons. Firstly, the highest court in which review of the federal question is possible in the Commonwealth of Kentucky, the Kentucky Supreme Court, has not reviewed the matter on the merits; although such review remains available to MECO should KAUFMAN and HAMNER obtain a judgment in the state court proceedings by virtue of direct appeal on the merits of the exclusivity of arbitration defense; and secondly, even assuming that the federal question had been decided adversely on the merits by the highest state court, which it has not, such a determination is hardly determinative of the remaining issue of breach of contract and damages where a substantial factual defense remains available to MECO on the merits of KAUFMAN and HAMNER's cause of action, thus precluding a finding that the final State court determination (even if one had taken place) would be dispositive or determinative of the remaining state court proceedings.

The second exception set forth in *Cox Broadcasting, supra,* that the federal question will necessarily survive the remaining state court proceedings, is also inapplicable. If the state court action proceeds on the merits and if MECO is in fact correct in its position on its

alleged federally asserted right to insist that this dispute be heard exclusively in arbitration, MECO's position could be substantiated by the Boyd Circuit Court as a defense to the Respondent's claim on the merits. MECO could be successful in its factual defense denying either breach of contract or damage occasioned thereby. MECO's federally asserted right could be recognized and protected by the Kentucky Court of Appeals or by the Supreme Court of Kentucky on appeal from any trial court judgment that might be entered. This Court could subsequently, should MECO be consistently denied its rights by erroneous state court decisions, protect MECO's right, if it exists, at a later date after final state court determinations. Accordingly, under most of the possible scenarios, MECO's claimed right, if valid, could be protected by the Kentucky courts and an eventual determination of the federally asserted right by this Court rendered unnecessary.

Accordingly, the federal question need not necessarily survive the further state court proceedings.

The third exception set forth in *Cox Broadcasting, supra,* that federal review of the case is necessary because the federal question will not be preserved regardless of the outcome of the state court proceedings is equally inapplicable. Should KAUFMAN and HAMNER prevail on the merits and should both the Court of Appeals and the Supreme Court of Kentucky hold that MECO was not entitled to arbitration of this dispute, appeal to the Supreme Court upon a Writ of Certiorari to the Supreme Court of Kentucky would

be available to the Petitioner and the federal question preserved for review by this Court at such time.

The fourth exception set forth in *Cox Broadcasting, supra,* that the federal issue has been finally decided by the state courts and further proceedings in the state court might result in the Petitioner prevailing on the merits on non-federal grounds precluding review of the federal issue and the decision of the federal issue would be dispositive of the litigation and the refusal of immediate review might seriously erode federal policy, is not applicable to the facts of this case. This exception is unavailable because, at the risk of repetition, firstly, the federal issue asserted has yet to be decided by the highest court in Kentucky, and secondly, no serious erosion of federal policy is involved since the determination of the claimed federal right is properly submitted to the concurrent jurisdiction of the state court.

Throughout its Petition MECO characterizes the state judicial proceedings as a blatant usurpation of a federal right in violation of the Supremacy Clause of the Constitution. However, what Petitioner is really complaining about is a preliminary adverse determination of the factual issue of whether waiver of the right to arbitration has occurred, a question of federal substantive law, property considered by the Boyd Circuit Court which is possessed of concurrent jurisdiction to decide that very issue. A preliminary determination of such a factual issue by a state court possessed of concurrent subject matter jurisdiction, even albiet erroneous, does not raise serious issues of the erosion of federal policy, especially where MECO has never

sought to raise this issue in a federal forum. In fact, a much more serious erosion of the principles of Federalism and State Sovereignty would be presented by the intrusion of the United States Supreme Court into such a matter prior to the Commonwealth of Kentucky's highest tribunal being given the opportunity to decide the federal issue on its merits in the regular and orderly procedure of the courts of the Commonwealth.

Professor Moore succinctly states that applicable question when considering the possible application of the exceptions set forth in *Cox Broadcasting, supra,* to a particular case is: ". . . whether the highest state court that could hear the case has finally adjudicated federal rights so that they are not subject to further review in the state courts, and there are policy factors that warrant Supreme Court review at this time." 12 J. Moore, *Federal Practice and Procedure,* § 509.01.

In the case at bar, neither requirement is met. The highest state court which could hear the case has yet to decide the asserted federal issue (which is primarily factual and is subject to the concurrent jurisdiction of federal and state courts) on the merits, and there are no special policy reasons that warrant Supreme Court review.

The burden to establish jurisdiction is on the Petitioner. The policy against premature constitutional adjudications demands that any doubts in maintaining this burden be resolved against jurisdiction. *Republic*

Natural Gas Co. v. *State of Oklahoma,* 334 U. S. 62, 68 S. Ct. 972, 92 L. Ed. 1212 (1948).

Therefore, the jurisdictional limitation of 28 U.S.C. § 1257 is not satisfied and this Court should deny the Writ sought for lack of jurisdiction.

II. The Kentucky Courts Have Not Disregarded the Provision of the Federal Arbitration Act Mandating Access to a Federal Forum and Have Not Violated the Supremacy Clause of the United States Constitution.

Petitioner argues that if a contract involving an arbitration clause exists, access to arbitration is guaranteed regardless of the circumstances, and that a state court is without power to enjoin such arbitration proceedings under any circumstances. Petitioner relies solely on *General Atomic Company* v. *Edwin L. Feltner,* 434 U. S. 12, 98 S. Ct. 76, 56 L. Ed. 2d 199 (1973), in support of its position, which Petitioner described as presenting a factual situation extremely analogous to the present case.

In *General Atomic Co., supra,* the state court proceeding involved a declaratory judgment action brought by United Nuclear Corporation against General Atomic Company, the successor in interest to UNC to certain contracts with utilities for the supply of uranium which required UNC to supply GAC with uranium. The state court declaratory action sought a determination of rights allowing GAC to void the contract.

Eventually, three federal court suits were brought by various utilities against GAC seeking to compel arbitration.

UNC, after becoming aware that GAC might seek to implead it in at least one of the federal actions pending, sought and obtained an ex parte restraining order and subsequently, after a hearing, a temporary injunction, in the state court proceedings restraining GAC from prosecuting any original, third-party or arbitration actions including UNC as a party that involved the subject matter pending in the state court.

This Court held in *General Atomic Co., supra,* that the state court lacked power to enjoin the proper exercise of jurisdiction by a federal court.

After the Court's decision in *General Atomic Co., supra,* the state court issued an order purporting to stay previously initiated arbitration proceedings by the utilities in at least three cases, although the order did not purport to apply to the Federal District Court action seeking to compel arbitration. *General Atomic Co.* v. *Feltner,* 436 U. S. 493, 56 L. Ed. 2d 480, 436 S. Ct. 494 (1978).

However, in the interim, before the issuance of the state court order, the arbitration proceedings sought to be stayed had been begun by order of at least two United States District Courts compelling submission of the issues to arbitration.

This Court, upon application for a Writ of Mandamus, held that the state court was without jurisdiction to interfere with the rights of GAC to obtain arbitration in a federal forum.

In the case at bar, the only federal court involved had remanded the case to state court because it lacked the requisite diversity jurisdiction and had never had

the issue of compulsory arbitration presented to it, thus properly allowing the state court to exercise its concurrent jurisdiction with respect to demands for arbitration subsequently raised under the Federal Arbitration Act.

In *General Atomic Co.,* two United States District Courts with proper jurisdiction had ruled on the issue of waiver and had ordered the matters in question compelled to arbitration before the issuance of the second restraining order purporting to enjoin the arbitration proceedings.

Clearly, in such a case, the state court does not have the requisite power to interfere with the right to the arbitration proceedings that have been adjudicated by a federal court with proper jurisdiction.

The *General Atomic Co.* case, *supra,* is clearly distinguishable on its facts, however, from the case at bar because no federal court has ever determined the right of MECO to compel arbitration of the matters in issue nor is the matter pending before any federal court, and the action of the state court, rather than interfering with the access of MECO to arbitration previously adjudicated in a federal forum, merely constitutes the exercise by the state court of concurrent jurisdiction on the issue of the right to arbitration after the appropriate federal court had declined to exercise jurisdiction.

Therefore, the Boyd Circuit Court has not denied the Petitioner access to a federal forum or in any way undermined the Supremacy Clause; it has merely exercised its concurrent jurisdiction to decide an issue

of federal substantive law after the United States District Court declined to do so because of a lack of diversity jurisdiction. The Kentucky appellate courts have declined to review the Circuit Court's determinations on the merits of the arbitration issue because the Petitioner failed to meet the necessary state law prerequisites for the extraordinary relief it sought.

III. The Kentucky Appellate Courts Have Not Denied the Petitioner Due Process of Law by Refusing to Consider Its Asserted Federal Right on the Merits Upon an Application of an Extraordinary Writ Where an Adequate Review of Such Asserted Right on the Merits is Preserved and the Procedural Law of the Courts of the Commonwealth of Kentucky Require Such a Result.

Petitioner asserts that the Orders of the Supreme Court of Kentucky and the Court of Appeals of Kentucky denying Petitioner a determination of its asserted federal right constituted a denial of due process of law.

Petitioner sought review of the Boyd Circuit Court's interlocutory injunction restraining Petitioner from proceeding in arbitration by motion, pursuant to Rule 65.07 of the Kentucky Rules of Civil Procedure (CR), and by Petition for a Writ of Prohibition, pursuant to Rule 76.36 of the Kentucky Rules of Civil Procedure (CR).

CR 65.07 provides in part that:

> "(1) When a circuit court by interlocutory order has granted . . . a temporary injunction, a party adversely affected may . . . move the Court of Appeals for relief from such order . . . (3) The

basis of such affirmative relief shall be the grounds specified in Rule 65.04(1)."

The grounds adopted by reference to CR 65.04(1) are "that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury pending a final judgment in the action. . . ."

Under Kentucky law, the relief sought by the Petition is available, even if the Petitioner's position on the merits of the injunction issued is correct, only where it has demonstrated irreparable injury would occur if the determination of the merits of the injunction is delayed until a final judgment of the trial court.

A motion under CR 65.07 requests an extraordinary remedy and must be evaluated in terms of both substantive and equitable principles. *Maupin* v. *Stanbury,* 575 S. W. 2d 695, (Ky. App. 1978). In order to require relief from an interlocutory injunction, which is not a determination on the merits, irreparable harm must be not only alleged but must be clearly shown. *Maupin, supra.*

A Writ of Prohibition is also an extraordinary writ and under Kentucky law is available only where the inferior court is proceeding or threatening to proceed in a matter where it has no jurisdiction and there is no remedy by application to an intermediary court, or where although proceeding within its jurisdiction, it is exercising or about to exercise such jurisdiction erroneously and there exists no adequate remedy by appeal, and great injustice or irreparable

injury will result if the Writ is not issued. *Pace* v. *Wolfenbarger,* 420 S. W. 2d 561 (Ky. 1967).

In this case, the failure of the state appellate courts to grant the Petitioner extraordinary remedies was properly based upon the absence of irreparable harm and the existence of an adequate remedy by appeal. Respondents, of course, assert that there is no erroneous denial of any right of Petitioner's, but assuming *arguendo* that the Trial Court's findings are erroneous, the Kentucky Supreme Court's refusal to decide such questions at this time, far from constituting a denial of due process, actually constitutes a proper and necessary procedural framework to facilitate the orderly administration of the courts of law of the sovereign Commonwealth of Kentucky and to guarantee due process to all litigants.

Petitioner has suffered no denial of due process and there is no need for this Court to issue a Writ on this basis.

IV. Any Conflict That Might Exist Between Federal Circuit Courts Regarding the Applicability of the Provisions of Section 3 of the Federal Arbitration Act to State Court Proceedings Would Not Be Resolved by Review of This Case Because the Facts of This Case Do Not Put the Application of This Section in Issue.

Petitioner asserts that a conflict exists between various United States Circuit Courts of Appeal with regard to the applicability of the stay provisions of Section 3 of the Federal Arbitration Act to state courts. However, this issue is not necessary to the decision of this case even if review is undertaken.

The stay provided for in Section 3 of the Federal Arbitration Act is to be issued, whether in federal or state court, only after a judicial determination that the party seeking to compel arbitration is not in default with respect to arbitration (i.e., has not waived arbitration).

This determination, as well as the determination that the contract has not been revoked under applicable law, must necessarily be made before any consideration need be given as to whether both federal and state court actions may be stayed under the Act.

KAUFMAN and HAMNER have vigorously asserted waiver, both by laches and delay and by participation in state court proceedings, and revocation of the contract containing the arbitration clause by novation of said contract by the subsequent agreement between the parties.

Since the Petitioner's asserted right to arbitration is capable of a proper determination under Federal substantive law that arbitration is not available, the peculiar facts of this case would prevent any landmark declination of the proper applicability of the Federal Arbitration Act stay provision to state court proceedings because the facts of this case do not establish the right to a stay of proceedings in any forum.

Because the resolution of the asserted conflicts of lower federal courts would not be required in the decision of this case, and because the peculiar facts of this case would have little, if any, applicability to the frequently occurring areas of conflict under the Act, this Court should deny the Writ requested.

CONCLUSION

This Court lacks jurisdiction to hear this case pursuant to 28 U.S.C. §1257 because the highest Court of the Commonwealth of Kentucky that could hear the case has not finally adjudicated the federal rights asserted and such asserted rights are subject to further review in the Kentucky courts, and because there are no special policy factors present to warrant review of this case at this juncture.

There exists no adequate reason to hear this case because the actions of the Kentucky courts herein have not denied the Petitioner access to a federal forum and have not denied Petitioner due process of law.

Review of this case would result in a decision based upon the peculiar factual circumstances of this case and such a decision would provide little, if any, guidance to other courts dealing with the areas of the Federal Arbitration Act in which conflicts have arisen in "ordinary" cases.

Accordingly, the Writ of Certiorari should be denied.

Respectfully submitted,

H. Gene Baldridge
James H. Moore III
Baldridge and Moore, P.S.C.
1924 Carter Avenue
P. O. Box 247
Ashland, Kentucky 41101

Attorneys for Respondents

CERTIFICATE OF SERVICE

I, James H. Moore III, one of the attorneys for the Respondents, do hereby certify that this Brief has been served upon all parties required to be served pursuant to Rule 28 of the Revised Rules of the Supreme Court of the United States by depositing three copies of the same in a United States Post Office, first class postage prepaid, addressed to counsel of record as follows: Hon. David B. Ratterman, Goldberg and Simpson, P.S.C., 2800 First National Tower, Louisville, Kentucky 40202; and Hon. Carl D. Edwards, Jr., VanAntwerp, Hughes, Monge and Jones, 1416 Winchester Avenue, Ashland, Kentucky 41101, Attorneys for Petitioner; and Hon. Charles S. Sinnette, Judge, Boyd Circuit Court, Division II, Boyd County Courthouse, Catlettsburg, Kentucky 41129, Respondent, this the 7th day of May, 1982.

James H. Moore III

JAMES H. MOORE III

Appendix

EXHIBIT A

ADDENDUM

WHEREAS, Keith Hamner and Harry Kaufman entered into a contract with MECO, Inc. for the construction of a coal loading facility on the Big Sandy River at mile point 726 on the Kentucky side by contract dated October 3, 1977, and

WHEREAS, a dispute has arisen between the parties as to the date of completion, liquidated damages, work stoppages by virtue of ingress and egress to the construction site over the Chessie System's Railroad track, and the specifications which will be followed in building the tippling facility and certain river work that must be performed on the pilings in the Big Standy River to enable the completion of the tippling facility, and

WHEREAS, the parties have, after much discussion, fully settled and compromised all matters that are in dispute, and desire that the settlement of all disputed matters be reduced to writing.

NOW, THEREFORE, this Addendum to the parties' October 3, 1977, contract, made and entered into this 3rd day of April, 1978, by and between Harry Kaufman and Keith Hamner of 191 College Street, West Liberty, Kentucky, hereinafter known as owners and MECO, Inc. of Louisville, Kentucky, hereinafter known as the Contractor.

WITNESSETH: That the parties hereto both acknowledge receipt of sufficient consideration for the mutual covenants and promises hereinafter contained, and for the execution of this Addendum to their October 3, 1977, contract. The Owner does hereby agree and promise to increase the contract price as set out in the October 3, 1977, contract, a copy of same being attached hereto and made a part hereof as though fully set out herein, to $300,000.00, said increase

of $22,500.00 shall be paid, together with any bonus hereinafter mentioned that might be due, at the rate of 10¢ per ton of all coal processed and loaded through said facility. The first payment shall be due the first of each month following the month in which coal is processed and loaded and each and every month thereafter until said $22,500.00 together with any bonus that might be due, is paid in full. The owners further promise and agree to supply the contractor with all weight receipts that are required to be supplied to George Arrington of Ashland, Kentucky. The owners further promise and agree to waive all liquidated damages that have accrued to date pursuant to the original contract herein, and further grant unto the contractor 90 days from the date of this Addendum to complete the coal loading facility, and have same operational. However, should the contractor complete the coal loading facility and have same operational prior to the expiration of 60 days from the date of this Addendum, then the owners shall pay the contractor a bonus of $500.00 per day for each day same is completed and operational prior to 60 days from the date hereof. Said bonus to be payable on a per ton basis as outlined above.

The contractor, in consideration of this Addendum, does hereby promise and agree to construct the coal loading facility and have same operational within 90 days from the date of this addendum, and to construct said facility in conformance to the specifications of the All-American Coal and Coal Port facility located at Coal Grove, Ohio, and recently constructed by the contractor herein, and known as Job No. 114, so that the quality and performance of said facility shall equal or exceed the All American Coal and Coal Port facility. It being understood that if any dispute should arise as to the type of materials or appliances to be used, then said dispute may be settled by comparing that material or appliance with the one used on the All Ameri-

can Coal and Coal Port jobs, same to be identical or exceed the ones used on the All American Coal and Coal Port jobs in quality and performance. Further, the contractor shall use copper wire for all electrical work. The contractor shall also complete all river work that is necessary to be done in order to construct thet coal loading facility and place same in operation. Specifically, the contractor shall bring the pilings up to level for the placing of the conveyor on same by utilizing X braced H pilings. Further, the contractor shall modify the dozer end loader-pusher apron to the coal bin so as to have an armor encased in concrete diversion shield. The contractor agrees to accept the existing letter of Guaranty obtained by the owners from the Miami Citizens National Bank and Trust Co. and will make no demand for any additional letter of Guaranty, credit or payment bond during the life of this contract. The contractor further agrees to release and relinquish and waive any causes of action or damages, past or present, that the contractor may have by virtue of any actions taken on the part of the owners prior to this addendum, and further, promises and agrees to pay the sum of $500.00 per day liquidated damages if they (contractor) fail to have the facility completed and operational within 90 days from the date hereof. (Subject to Art. III of original contract. K.H.) Completion for the purposes of this Addendum shall mean completion of all phases of the construction to be done by the contractor, and that said facility be tested and operational so as to allow for a commercial coal barge loading operation.

This Addendum shall be binding on and inure to the parties' heirs, successors and assigns.

WITNESS our hands the last above written date.

Owner:

(s) Harry Kaufman

(s) Keith Hamner

Contractor:

MECO, Inc.
By: (s) Joe Duley, President

Attest:

_____
Secretary

Witness:

_____
To All Parties.

EXHIBIT B

AGREEMENT

WHEREAS, Keith Hamner and Harry Kaufman entered into a Contract with Meco, Inc., together with an Addendum therefore for the construction of a coal loading facility on the Big Sandy River at Mile Point 726 on the Kentucky side, said contract being dated October 3, 1977, and said Addendum being dated the 3rd day of April, 1978, and

WHEREAS, pursuant to said contract and addendum, a payment of $100,000.00 is due, and

WHEREAS, Meco, Inc., has performed certain extras on said job together with other extra work that is claimed by Meco, Inc. but disputed by Keith Hamner and Harry Kaufman, and

WHEREAS, the parties have discussed all of said disputed matters and have reached an amicable settlement wherein Keith Hamner and Harry Kaufman have agreed to pay the sum of $43,000 at the rate of 25¢ per ton for each ton of coal that is processed and loaded through said facility which said sum will be over and above the original contract price of $277,500.00 and would include the sum of $22,500.00 mentioned in the April 3, 1978, addendum to said Contract,

NOW THEREFORE, THIS AGREEMENT made and entered into this 11th day of July 1978, by and between KEITH HAMNER and HARRY KAUFMAN, hereinafter referred to as OWNERS, and MECO, INC., hereinafter referred to as CONTRACTOR,

WITNESSETH: That the parties hereto both acknowledge receipt of sufficient consideration for the mutual covenants and promises hereinafter contained and for the execution of this Agreement, the Owners do hereby agree to pay the Contractor herein the additional sum of $43,000.00 which

said sum is over and above the $277,500.00 original contract price, but, however, includes the $22,500.00 increase which is contained in the addendum to the original contract dated April 3, 1978, said $43,000.00, however, shall be paid at the rate of $.25 per ton for each ton of coal processed and loaded through the Big Sandy River Coal Loading facility. The first payment shall be due the first of each month following the month in which coal is processed and loaded and each and every month thereafter until said $43,000.00 is paid in full. The Owners further promise and agree to supply the Contractor with all weight tickets that are required to be supplied to George Arrington of Ashland, Kentucky.

The Contractor, in consideration of the above, does hereby agree and promise that said $43,000.00 mentioned above represents full compromise and settlement for any and all extra work that has been performed or is to be performed by the Contractor which includes but is not limited to:

1. Cleaning of old pit.
2. A 12 x 60 office trailer van located on the premises and contractor shall furnish a title free and clear of all liens, upon the execution of this Agreement.
3. Drilling well and installation of pump and sewer system.
4. Mounting of scales and three new cables on river pier to guide barges.
5. Includes a all river work from river piers to conveyor, control house and winch.
6. Lights and hookups for one private trailer and scale house.
7. Installation of and pulling of telephone wire.
8. Any and all other work that has been done or will be required to be done on tipple (under contract. J.D.)

The Contractor hereby agrees to ~~diligently~~ pursue the completion of the facility that is the subject of this Agreement pursuant to the Addendum and Contract.

The $.25 per ton payment mentioned above shall be paid when due directly to The Greenup County Bank of Greenup, Kentucky, and credited to the account of Meco, Inc.

The owner and contractor have agreed that joint checks shall be issued for the sum of $100,000.00 payable to the contractor and various subcontractors and materialmen as shown on the attached sheet marked Exhibit A and made a part hereof as though fully set out herein and the owners shall pay the remaining balance of the original contract price of $37,500.00 by joint checks to the remaining materialman and subcontractors contained in Exhibit A in thirty (30) days from the date hereof and shall complete the issuance of said checks within sixty (60) days and shall then pay the balance of said $37,500.00, if any remain, to Meco, Inc., all of the above being subject to the contractor's fulfillment of the original contract and addendum thereto.

The Contractor further agrees to indemnify and defend and hold the Owner harmless from any and all liens that might be billed by any subcontractor or materialman on said project that is the subject of this agreement and further warrant that no liens to date have been filed and that Exhibit A is a true and correct statement of all unpaid labor and material bills on said project.

It is agreed and understood by and between the parties hereto, that this Agreement is in full settlement and compromise of any and all claims which the Contractor might have for additional monies due by reason of any extras performed on said job together with any and all other claims, if any there be, or that said Contractor might have as a result of the work performed for the Owners to date.

This Agreement is made for the sole purpose of compromising and settling all differences which exist between the Contractor and Owners as the compensation for the Contractor from the Owners on this project and all responsibilities of the Owners and Contractor under said Contract and Addendum shall remain in full force and effect except as set out herein.

WITNESS our hands this ____ day of _____, 1978.

(s) Keith Hamner
Keith Hamner, Owner

(s) Harry Kaufman
Harry Kaufman, Owner

MECO, Inc.
By: (s) Joseph Dooley 7/11/78
Joe Dooley, President

EXHIBIT C

[LETTERHEAD OF METROPOLITAN ENGINEERING COMPANY INC.]

June 26, 1979
American Arbitration Association
2308 Carew Tower
Cincinnati, Ohio 45202

Attn: Ms. Gail T. Fischer
Tribunal Administrator

Re: 52 10 0090-78
Metropolitan Engineering Co., Inc.
Louisville, Ky.

— and —

Keith Hamner & Harry Kaufman
Greenup, Ky.

Dear Gail:

I request that the above mentioned case be withdrawn from arbitration. Thank you for your assistance in this matter.

Sincerely yours,

MECO, Inc.
(s) Joseph P. Dooley
President

EXHIBIT D

BOYD CIRCUIT COURT

No. 79-CI-014

HARRY KAUFMAN and
KEITH HAMNER, - - - - - - - *Plaintiffs,*

v.

MECO, INCORPORATED, - - - - - *Defendant.*

MOTION TO FILE A LATE ANSWER AND COUNTERCLAIM

Comes now MECO, Inc., by counsel, and moves the Court for leave to file the attached Answer and Counterclaim in the above styled action. In support of this motion, Defendant states as follows:

1. The Plaintiffs' Complaint was filed on January 12, 1979 and the Defendant petitioned for removal to the United States District Court for the Eastern District of Kentucky, and Defendant filed an answer February 2, 1979, in Federal Court.

2. This action was returned to the Boyd Circuit Court on May 2, 1979.

3. In June, 1979, Defendant's counsel, Hon. James E. Cleveland, III, found he could no longer represent the Defendant, MECO, Inc., due to a conflict of interest.

4. No motion for default judgment has been made by the Plaintiffs.

5. Defendant has a good and meritorious defense to the allegations in the Plaintiffs' Complaint.

6. The Plaintiffs would not be prejudiced by the late filing of the Answer and Counterclaim, in that they were placed on notice of the Defendant's position in the Answer timely filed in the Federal Court. Therefore, justice will be served by the granting of the filing of said Answer and Counterclaim.

WHEREFORE, Defendants move that the attached Answer and Counterclaim be permitted to be filed by the Defendants.

Law Offices of Pruitt & Vincent

By (s) Jerry P. Vincent
Attorney for Defendant
P. O. Box 405
Ashland, Ky. 41101

I hereby certify that a true copy of the foregoing Motion was mailed to: Hon. John R. McGinnis, Attorney for Plaintiffs, Braden Bldg., Greenup, Ky., 41144, this 2nd day of October, 1979.

(s) Jerry P. Vincent

NOTICE

The parties will take notice that the foregoing motion will be heard on the 5th day of October, 1979, at the Boyd Circuit Courtroom, Courthouse, Catlettsburg, Ky., at the hour of 1:30 p.m., or as soon thereafter as counsel may be heard.

EXHIBIT E

BOYD CIRCUIT COURT

79-CI-014

HARRY KAUFMAN and
KEITH HAMNER, - - - - - - - *Plaintiffs,*

v.

MECO, INCORPORATED, - - - - - *Defendant.*

ANSWER AND COUNTERCLAIM

Comes now the Defendant, Meco, Incorporated, by counsel, and for their answer, state as follows:

1. The Complaint fails to state a cause of action upon which relief may be granted.

2. The Defendant admits Paragraph 1 of the Complaint.

3. The Defendant admits that on the 3rd day of October, 1977, the Plaintiffs entered into a contract and agreement with the Defendant whereby the Defendant promised and agreed to build and construct a coal loading and tippling facility on lands leased by the Plaintiffs and located on the Big Sandy River in Boyd County, Kentucky.

4. The Defendant denies that a full copy of said contract was attached by the Plaintiffs and attaches to and makes a part of its Answer a full copy of the contract including "General Conditions of the Contract for Construction" which was incorporated by reference into the contract and made a part thereof. A copy of said contract containing the general conditions of the contract for construction

is attached to and made a part of the Defendant's answer as "Exhibit A".

5. Defendant admits so much of Paragraph 3 of the Complaint as states, "Plaintiff and Defendant entered into an Addendum settling all disputes that had arisen between the parties hereto concerning the construction and building of the coal loading facility mentioned above". However, Defendant states that the Plaintiffs not only breached the original contract, as mentioned in Paragraph 2 of the Complaint, but also breached the agreement and Addendum thereto.

6. The Defendant denies the statements and allegations contained in numerical paragraphs 4 and 5 of Plaintiff's Complaint.

7. Defendant admits so much of Paragraph 6 of the Complaint, as states that there was a lien filed against the property of George Arrington, said lien being recorded in Lien Book 6, Page 701 of the Boyd County Court Clerk's Records for the sum of $63,000.00. Defendant does not have sufficient information to form a belief as to the truth of whether the Defendant had the lien removed from the property by posting a bond pursuant to pertinent Kentucky Revised Statutes, and therefore, denies same. Defendant denies specifically that the lien is defective and invalid.

8. The Defendant denies each and every allegation of the Plaintiff's Complaint not specifically admitted in this answer.

WHEREFORE, the Defendant, Meco, Inc., having fully answered Plaintiff's Complaint herein, prays that the Complaint be dismissed and that the Defendant, Meco, Inc., recover their costs herein expended and for any and all other relief to which they may appear entitled.

COUNTERCLAIM

Comes now the Defendant, Meco, Inc., and for its counterclaim in the above styled action, states as follows:

1. That Meco, Inc., is a corporation organized and existing by virtue of the laws of the Commonwealth of Kentucky with the right to sue or be sued, contract or be contracted with, in its own name.

2. That on or about the 3rd day of October, 1977, Meco, Inc. entered into a contract and agreement with the Plaintiffs, Harry Kaufman and Keith Hamner, whereby Meco, Inc., promised and agreed to build and construct coal loading and tippling facility on lands leased by the Plaintiffs and the Plaintiffs agreed to pay for said facility.

3. That on or about the 11th day of July, 1978, Meco, Inc., and the Plaintiffs entered into an Addendum purporting to settle all disputes that had arisen between the parties concerning the construction and building of the said coal loading facility.

4. That the Plaintiffs have breached said contract, agreement and Addendum mentioned above, by failing to provide payment, as provided by the contracts.

5. On the 16th day of March, 1979, the Defendant served notice of its intent to terminate said contracts on Tuesday, March 20, 1979, on the Plaintiffs, by mailgram (copy attached hereto and made a part hereof and marked Exhibit 1). On the 27th day of March, 1979, the Defendant caused to be sent, certified mail, return receipt requested, a letter to the Plaintiffs. Said letter was notice of termination of the aforementioned contract (a copy of that letter is attached hereto and made a part hereof, marked Defendant Exhibit ____.

6. That as a direct and proximate result of the Plaintiffs breach of the original contract (dated October 3,

1977), the Defendant has been damaged in the amount of $90,000.00 for lost profit under that contract.

7. That as a direct and proximate result of the Plaintiffs breach of the Addendum dated July 11, 1978, the Defendant has been damaged in the amount of $180,000.00

8. As per agreements by and between Plaintiffs and the Defendant, the Plaintiffs now owe to the Defendant $159,000.00 for extra work completed on the coal loading facility.

9. In the alternative to Paragraph 8 above, the Plaintiffs owe to the Defendant the sum of $102,100.00.

WHEREFORE, Defendant prays that it recover from the Plaintiffs $90,000.00 lost profits, $180,000.00, for Breach of Addendum, $159,000.00 for extra work on coal facility, or in the alternative for $102,100.00 under Addendum of July 11, 1978, for their costs herein expended and for any and all other relief to which they may appear entitled.

Law Offices of Pruitt & Vincent

By (s) Jerry P. Vincent
Attorney for Defendant
P. O. Box 405
Ashland, Ky. 41101

I hereby certify that a true copy of the foregoing was mailed to Hon. John R. McGinnis, Attorney for Plaintiffs, Braden Bldg., Greenup, Ky., this 2nd day of October, 1979.

(s) Jerry P. Vincent

EXHIBIT F

BOYD CIRCUIT COURT

No. 79-CI-014

HARRY KAUFMAN and
KEITH HAMNER, - - - - - - - *Plaintiffs,*

v.

MECO, INCORPORATED, - - - - - *Defendant.*

LIS PENDENS NOTICE

The Plaintiffs, Harry Kaufman and Keith Hamner, will take notice that the Defendant Meco Inc., claim a lien upon all the right, title and interest of the Plaintiffs in and to the coal loading tipple facilities owned by the Plaintiffs and located on the Big Sandy River, Boyd County, Kentucky, more fully described in the Complaint in Clerks office, Action No. 78-CI-014.

They will take notice that the Action in which this lien is claimed is described above, filed 12th day of January, 1979. The name of the person who's name and right, title and interest there is claimed is Harry Kaufman and Keith Hamner, and all persons claiming interest thereto under them.

The description of the real property upon which demand is claimed is described in Complaint 79-CI-014 in the Boyd Circuit Court records.

The amount for which the Defendants claim for said lien is Three Hundred Thirty One Thousand Thirty One

($331,031.00) Dollars Plus interest at the rate of eight percent (8%). In addition, costs shall be paid by the Plaintiffs and these costs are unknown.

Law Offices of Pruitt & Vincent

By: (s) Garis L. Pruitt

I hereby certify that a true copy of the following was mailed to John R. McGinnis, Attorney for Plaintiffs, Braden Bldg., Greenup, Kentucky. This 29th day of November, 1979.

(s) Garis L. Pruitt